

IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

-----x	:
METHANEX CORPORATION,	:
Claimant/Investor,	:
and	:
UNITED STATES OF AMERICA,	:
Respondent/Party.	:
-----x	:
	Volume 7

SECOND FINAL AMENDED TRANSCRIPT

Tuesday, June 15, 2004

The World Bank
1818 H Street, N. W.
MC Building
Conference Room 13-121
Washington, D. C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:50 a. m. before:
V. V. VEEDER, Q. C., President
PROF. W. MICHAEL REISMAN, Arbitrator
J. WILLIAM ROWLEY, Q. C., Arbitrator

Also Present:

SAMUEL WORDSWORTH,
Tribunal Legal Secretary

MARGRETE STEVENS,
Senior ICSID Counsel
Tribunal Administrative Secretary

Court Reporter:

0615 Day 7

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1598

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1599

C O N T E N T S

	PAGE
WITNESS	
JAMES STIRWALT	
Direct examination by Mr. Dugan	1603
Cross-examination by Mr. Legum	1607
PATRICK McANISH	
Direct examination by Mr. Dugan	1619
Cross-examination by Mr. Legum	1628
Questions from the Tribunal	1669
Redirect examination by Mr. Dugan	1678
Methanex's Reply to USA's Motion	1680
USA's Reply to Methanex's Response	1730

1600

1 P R O C E E D I N G S

2 PRESIDENT VEEDER: Good morning, ladies
3 and gentlemen. We begin day seven of this hearing,
4 and since it seems we're all ready, we'll start
5 before our designated time of 10:00.

6 Now, we can see you on the video, and I
7 think it's Mr. McAnish, is it? Can you hear me?
8 Unless we learn to lip-read, we have a problem. If
9 you can hear us, Mr. McAnish, can you raise your
10 right hand, please.

11 If you can hear me, can you un-mute your
12 microphone, please. Your microphone at your end is
13 muted. If you can have the engineer un-mute the
14 microphone. Can you hear me now?

15 THE WITNESS: Yes. Can you hear us?

16 PRESIDENT VEEDER: Can you identify
17 yourselves for us, please, the gentleman at the end
18 of the table facing the camera.

19 THE WITNESS: James Stirwalt.

20 PRESIDENT VEEDER: Mr. Stirwalt. And the
21 gentleman next to him also in sight of the camera.

1601

1 THE WITNESS: Patrick McAnish.

2 PRESIDENT VEEDER: And is there somebody
3 opposite you, Mr. McAnish?

4 MR. McNEILL: Yes, there's our technician
5 here.

6 THE TECHNICIAN: Good morning. I'm the IT
7 manager, Eric Pizelgrant, of Paul Hastings of Los
8 Angeles.

9 PRESIDENT VEEDER: Thank you very much.
10 Which witness are you going to present
11 first?

12 MR. DUGAN: Mr. Stirwalt.

13 PRESIDENT VEEDER: Mr. Stirwalt, we're
14 going to begin with you as a witness, but under our
15 rules agreed by the parties, Mr. McAnish has to
16 leave the room while you're giving evidence. So,
17 Mr. McAnish, I'm sorry, but could you sit in a
18 different room where you're not listening to the
19 testimony of Mr. Stirwalt.

20 THE TECHNICIAN: Okay, that is taken care
21 of.

1602

1 PRESIDENT VEEDER: Mr. Stirwalt, you're
2 being presented by Methanex as a witness, and the
3 Tribunal would invite to you make a declaration.
4 I'll read it out, and if you're willing to make
5 that declaration, we'll go through it phrase by
6 phrase.

7 THE WITNESS: Okay.

8 JAMES STIRWALT, CLAIMANT/INVESTOR'S WITNESS, CALLED

9 PRESIDENT VEEDER: So, the declaration is
10 as follows: I solemnly declare upon my honor and
11 conscience that I shall speak the truth, the whole

12 truth, and nothing but the truth.

13 Are you willing to make that declaration?

14 THE WITNESS: Yes, I am.

15 PRESIDENT VEEDER: Let's go through it
16 together. I solemnly declare--

17 THE WITNESS: I solemnly declare--

18 PRESIDENT VEEDER: --upon my honor and
19 conscience--

20 THE WITNESS: --upon my honor and

21 conscience--

1603

1 PRESIDENT VEEDER: --that I shall speak
2 the truth--

3 THE WITNESS: --that I shall speak the
4 truth--

5 PRESIDENT VEEDER: --the whole truth--

6 THE WITNESS: --the whole truth--

7 PRESIDENT VEEDER: --and nothing but the
8 truth.

9 THE WITNESS: --and nothing but the truth.

10 PRESIDENT VEEDER: Thank you very much.

11 Mr. Dugan will now ask you some questions.

12 DIRECT EXAMINATION

13 BY MR. DUGAN:

14 Q. Good morning, Mr. Stirwalt. I'm Chris
15 Dugan from--

16 A. Good morning.

17 Q. I'm Chris Dugan from the law firm of Paul
18 Hastings, and I represent Methanex Corporation in

19 this NAFTA arbitration.

20 First of all, I would like to thank you
21 for showing up twice now. We know you came in from

1604

1 your home yesterday and had to turn around and go
2 back, and I apologize for that. And we hope to
3 get--

4 A. Not a problem.

5 Q. And we hope to get this taken care of with
6 reasonable dispatch.

7 A. Fine.

8 Q. Do you have in front of you the witness
9 statement that you signed?

10 A. The declaration, yes, I do.

11 Q. And is that the declaration that's dated
12 June 12, 2004?

13 A. Yes, sir.

14 Q. And it contains five paragraphs, five
15 numbered paragraphs?

16 A. Yes, it does.

17 Q. Okay. If we could go over just a few
18 issues with respect to that.

19 Now, you state in here that you're a
20 licensed investigator. Could you tell us under
21 what name you are licensed.

1605

1 A. I'm under a license under my name, James

2 A. Stirwalt, and also my company name, Bonanza,
3 common spelling, Investigations, Inc.

4 Q. Okay. And have you ever been disciplined
5 or reprimanded in any way with respect to your job
6 as a private investigator?

7 A. No, sir.

8 Q. Now, this states that in August 2000, you
9 were contacted by an entity called Control Risk
10 Group of McLean. Can you explain what Control Risk
11 Group in McLean is.

12 A. Control Risk, as I understand it, is an
13 investigative company. At that time, I know they
14 had an office in San Francisco and also in, I
15 believe, Washington, D.C., and there were probably
16 other branches of that company.

17 Q. Okay. And did you know anyone personally
18 at Control Risks?

19 A. I did not know either one of the gentleman
20 that I dealt with on this particular case. I was
21 referred to them by some other people. However, I

1606

1 had talked to both of these individuals on the
2 phone on several occasions prior to August of 2000.

3 Q. Now, was it your understanding, when you
4 conducted your work on this assignment, that you
5 were at all times acting legally?

6 A. Yes, sir.

7 Q. What was that based on?

8 A. Well, my background in law enforcement. I
9 have a pretty good understanding of the law, and in

10 regards to this particular case, we actually
11 discussed with the law firm during this case
12 regarding certain issues involving the discarded
13 material that we were seizing on almost a daily
14 basis. And it was the opinion of both myself and
15 the law firm that we were acting in a legal manner.

16 Q. And you mentioned--

17 A. At all times.

18 Q. And you mentioned that you discussed some
19 issues. What issues were those that you discussed?

20 A. The issues were just the legality of
21 obtaining the discarded items from a trash dumpster

1607

1 at a business in the city of Brea, California.

2 Q. Do you remember with any more specificity
3 what the precise issues were?

4 A. Well, we just discussed to make sure that
5 we weren't violating any city ordinance. There was
6 an ordinance regarding trash containers in that
7 city, and we discussed that with the law firm, and
8 it was their opinion, their legal opinion, that we
9 were not violating any city ordinance or any laws
10 in what we were doing during that period of time.

11 MR. DUGAN: Okay. I have no further
12 questions, Mr. Veeder.

13 PRESIDENT VEEDER: Thank you, Mr. Dugan.

14 (Pause.)

15 PRESIDENT VEEDER: Thank you. Mr. Legum.

16 CROSS- EXAMINATION

17 BY MR. LEGUM

18 Q. Mr. Stirwalt, my name is Bart Legum. I'm
19 an attorney with the NAFTA Arbitration Division of
20 the United States Department of State, and I will
21 be asking you a few questions this morning.

1608

1 A. Fine.

2 Q. First, did you draft your witness
3 statement?

4 A. Well, it was orally put together over the
5 telephone, and then it was e-mailed to me, and then
6 I signed it. And that's when I read it and
7 returned it to the law firm.

8 Q. And you read it carefully before you
9 signed it; is that correct?

10 A. Yes, I did.

11 Q. And the contents of that witness statement
12 are true and correct, to the best of your
13 knowledge?

14 A. To the best of my knowledge, everything in
15 that declaration is true.

16 Q. Were you paid for your time on Saturday,
17 when you reviewed this?

18 A. Not yet.

19 Q. But your understanding is that Methanex is
20 going to pay you for your time that you spent
21 preparing this witness statement?

1609

1 A. Probably going to send them a bill, yes.

2 Q. And are you going to be paid for your time
3 during your testimony today?

4 A. I would include today's time, yes.

5 Q. Now, under examination by Mr. Dugan, you
6 referred to your work on this assignment; do you
7 remember that?

8 A. I do.

9 Q. What work did you do?

10 A. I actually organized this particular
11 investigation based on some communications I
12 received from a Mr. -- or two individuals from
13 Control Risk Company, and that was on or about
14 August 24th of the year 2000. The assignments were
15 given to me in writing and verbally, and it
16 regarded the-- regards to obtaining discarded
17 documents from a trash container at our location in
18 the city of Brea, California.

19 Q. So, you got the assignment in August 2000.
20 What did you do after getting the assignment?

21 A. I referred this assignment to Patrick

1610

1 McAnish, who had done quite a bit of work for me in
2 the past at that time, and he handled it,
3 physically handled it from there on. I maintained
4 the communication between the investigative
5 company, Control Risk, and later with a law firm in
6 Washington, D. C.

7 Q. Did you ever go out to 910 Birch Street

8 and visit the site?

9 A. I did not.

10 Q. Now, who was your client?

11 A. Well, initially, it was Control Risk.

12 Q. And then after--

13 A. And later, the law firm Sorry.

14 Q. No problem.

15 Who was Mr. McAnish's client?

16 A. Mr. McAnish was working at my direction

17 and actually for me.

18 Q. So, Control Risk and later the law firm
19 paid you, and you paid Mr. McAnish; is that right?

20 A. That's correct.

21 Q. Now, you referred to discussions with a

1611

1 law firm Which law firm was that?

2 MR. DUGAN: If I could object to that. If
3 I could object to that on relevance grounds.

4 PRESIDENT VEEDER: I think we've heard
5 your objection, Mr. Dugan. We are going to make
6 the same ruling as before.

7 The question is a proper question, but,
8 Mr. Stirwalt, whether you want to answer that
9 question is a matter for you.

10 Did you hear what I said?

11 THE WITNESS: Yes, I did.

12 I would prefer not to mention the name of
13 the law firm If I'm so ordered to do so, I
14 certainly will.

15 BY MR. LEGUM

16 Q. Was it a California law firm?

17 A. No, sir.

18 Q. To your knowledge, were there any experts
19 in California law that you consulted with on the
20 legal matters that you referred to under
21 examination by Mr. Dugan?

1612

1 A. I did not.

2 Q. On the basis of what analysis or authority
3 did you conclude that your and Mr. McAnish's
4 conduct did not violate the Brea city law?

5 A. Well, this was ultimately the opinion
6 given to me by the law firm that I was dealing with
7 at that time. It was their--it was their opinion.

8 Q. So, they told you the answer, but they
9 didn't tell you the reasons that led them to that
10 answer?

11 A. Well, they were given copies of the
12 ordinance for the City of Brea at my direction.
13 They had asked for that. And then they researched,
14 I assume they researched that ordinance, and I was
15 told that it was their opinion that there was no
16 legal issue there regarding our conduct.

17 Q. Did you ever have any conversations with
18 Mr. McAnish about where he was collecting the
19 documents from?

20 A. Yes.

21 Q. What did he tell you?

1613

1 A. He told me that on a daily basis he was
2 responding to the business building on Birch Street
3 in the city of Brea early in the morning hours, and
4 that was--that he was obtaining discarded documents
5 from the dumpster at that location, which was
6 usually open or was available to the tenants and
7 persons occupying that building.

8 Q. Did you ever have any conversations with
9 Control Risks group or the law firm about how
10 Mr. McAnish was collecting these documents?

11 A. I may have. I just don't recall
12 specifically what, you know, what conversation, but
13 I'm sure we did discuss it.

14 Q. Do you remember what you told them about
15 how the documents were being collected?

16 A. Just as I stated to you, the same thing,
17 that we were responding there early in the morning,
18 we were obtaining documents from that location, and
19 then we were shipping those documents back to
20 Control Risk initially, and then later to--directly
21 to the law firm.

1614

1 Q. Did you tell them that documents were
2 being obtained from inside the building?

3 A. I may have.

4 Q. But you don't remember one way or the
5 other, as you sit here today?

6 A. I don't. I don't specifically remember
7 any conversation we had. It was about three years
8 ago, but I'm sure we discussed that.

9 Q. Have you ever heard of Robert Puglisi?

10 A. No, I don't know that name.

11 Q. How about Terry Dunne?

12 A. I know the name Terry Dunne. I know a
13 little bit about his background in law enforcement,
14 yes.

15 Q. Did you ever have any conversations with
16 Mr. Dunne concerning collection of documents at 910
17 Birch Street in Brea?

18 A. Not during the case, no.

19 Q. Did you ever have any conversations with
20 Mr. Dunne about collecting documents from 910 Birch
21 Street in Brea?

1615

1 A. I received a telephone call from Mr. Dunne
2 yesterday, and we discussed the matter regarding
3 the testimony and just briefly about the
4 particulars of the collection of the documents.

5 Q. Aside from that one conversation, did you
6 have any communications with either Mr. Puglisi or
7 Mr. Dunne concerning collection of documents at
8 that location in Brea?

9 A. Not prior to yesterday's conversation, no.
10 And the other individual, I've never
11 talked to.

12 Q. Just one moment, please.

13 (Pause.)

14 Q. What did you say to Mr. Dunne and what did
15 he say to you in this conversation that you had
16 concerning collection of documents at that
17 location?

18 A. First of all, Mr. Dunne introduced himself
19 on the phone and reminded me that we had actually
20 personally met several years ago while I was still
21 involved in the law enforcement world. He

1616

1 indicated that he had been involved in this case,
2 and we didn't really get into it to any extent
3 other than that prior to our involvement that he
4 personally had been involved in this case, and he
5 was just asking me what was going on with the
6 testimony. He did say that he was not in the
7 private investigation business anymore, and he was
8 living somewhere in the Midwest.

9 Q. Anything more to that conversation than
10 what you just described?

11 A. No, I don't recall anything additional.
12 It was just a friendly conversation that probably
13 lasted four, five minutes.

14 Q. One final question. Did Control Risk
15 Group or the law firm know that it was not you who
16 was collecting the documents from that location?

17 A. I believe so. I believe that was
18 discussed.

19 Q. You told them that?

20 A. I believe so, yes.

21 MR. LEGUM: No further questions.

1617

1 PRESIDENT VEEDER: Thank you. Mr. Dugan,
2 do you have any further questions?

3 MR. DUGAN: No redirect.

4 PRESIDENT VEEDER: Mr. Stirwalt, thank you
5 very much. We have come to the end of the
6 questions, and from the Tribunal, also, we thank
7 you for making yourself available as a witness this
8 morning.

9 THE WITNESS: Thank. Would you like me to
10 stand by or am I excused?

11 PRESIDENT VEEDER: You are excused.

12 THE WITNESS: Thank you.

13 (Witness steps down.)

14 PRESIDENT VEEDER: If you could ask
15 Mr. McAnish to come into the room, we'd be
16 grateful.

17 PATRICK MCANISH, CLAIMANT/INVESTOR'S WITNESS,

18 CALLED

19 PRESIDENT VEEDER: Good morning, again,
20 Mr. McAnish.

21 THE WITNESS: Good morning, sir.

1618

1 PRESIDENT VEEDER: The Tribunal will ask
2 you to make a declaration in the form of words
3 which I shall read out to you. If you are willing

4 to make that declaration, we will go through it
5 phrase by phrase.

6 THE WITNESS: Okay.

7 PRESIDENT VEEDER: So, this is the
8 declaration we'll invite you to make as a witness.

9 I solemnly declare upon my honor and
10 conscience that I shall speak the truth, the whole
11 truth, and nothing but the truth.

12 Are you willing to make that declaration?

13 THE WITNESS: Yes.

14 PRESIDENT VEEDER: Let's go through it
15 phrase by phrase.

16 I solemnly declare--

17 THE WITNESS: I solemnly declare--

18 PRESIDENT VEEDER: --upon my honor and
19 conscience--

20 THE WITNESS: --upon my honor and

21 conscience--

1619

1 PRESIDENT VEEDER: --that I shall speak
2 the truth--

3 THE WITNESS: --that I shall speak the
4 truth--

5 PRESIDENT VEEDER: --the whole truth--

6 THE WITNESS: --the whole truth--

7 PRESIDENT VEEDER: --and nothing but the
8 truth.

9 THE WITNESS: --and nothing but the truth.

10 PRESIDENT VEEDER: Thank you very much.

11 Mr. Dugan.

12 DIRECT EXAMINATION

13 BY MR. DUGAN:

14 Q. Good morning, Mr. McAnish.

15 A. Good morning, sir.

16 Q. First thing I would like to do is thank
17 you for coming out again today, as did you
18 yesterday. I apologize that you had to do it
19 twice, and we very much appreciate your effort to
20 cooperate.

21 I would just like to go over a few of the

1620

1 issues in your witness declaration. The first
2 thing is, can you tell me if you have the witness
3 declaration in front of you?

4 A. Yes, I do, sir.

5 Q. And is this a three-page witness
6 declaration signed on June 12th with eight numbered
7 paragraphs?

8 A. Yes, it is.

9 Q. And are there a number of photographs
10 attached to it?

11 A. The photographs are right next to it.

12 Q. Can you tell us what name you practiced as
13 a licensed investigator under? What was the name
14 of your firm?

15 A. Beach Investigations.

16 Q. And you were registered with the
17 appropriate California authorities?

18 A. That's correct.

19 Q. Were you ever disciplined in any way?

20 A. No, sir.

21 Q. Okay. Now, I'm going to take you through

1621

1 the photographs just to make sure that it's clear
2 for the record which ones are which.

3 Now, the first photograph that we have is
4 a photograph of the Embassy Court, I guess, the
5 tenant board, you could call it; is that correct?

6 A. The directory, yes.

7 Q. And we have identified that as Exhibit
8 X15.

9 The second is a picture of the facilities,
10 the address where you had collected the documents
11 taken from across the street; is that correct?

12 A. That's correct.

13 Q. And we have identified that as Exhibit
14 X16.

15 Third is a picture of the facility taken
16 from the opposite point of view, looking down
17 across the parking lot to the doors to the
18 dumpsters at the very end; is that correct?

19 A. If you're talking about--is there a van in
20 the center? This photo.

21 Q. There is a van in the front--no, no, it's

1622

1 not that one. I will hold--hold up another one,

2 and I will tell you which one we are talking about.

3 A. This one?

4 Q. Yes, it appears to be that one. Okay.

5 And that is Exhibit 17.

6 Next is a photo of the two vans. Do you
7 have that one?

8 A. Yes.

9 Q. And that is marked as Exhibit 18.

10 Next is a photograph, a closer up
11 photograph of the doors to the dumpsters.

12 Yes, and that has been marked as Exhibit
13 X19.

14 Next is a very close-up of the doors to
15 the dumpsters taken from just a few feet away.

16 Yes.

17 And that has been marked as Exhibit X20.

18 Next is a copy of the two dumpsters taken
19 with the doors of the two dumpsters open.

20 Yes.

21 That has been marked as Exhibit X21.

1623

1 And next is an even closer up picture of
2 the two dumpsters.

3 A. Yes.

4 Q. Yes.

5 And that has been marked as X22.

6 And finally, there is a picture taken from
7 it appears to be the driveway showing the signs
8 Hotel Retail Parking.

9 Hotel Retail Parking, yes.
10 And that is Exhibit X23.
11 A. The numbering started with 15, did you
12 say?
13 Q. The numbering started with X15, X16, X17,
14 and then it skips to X19, X20, X21, X22, and X23.
15 Now, Mr. McAnish, who were the tenants in
16 the building at the time you conducted your work?
17 A. There was--let's see. There were six
18 tenants at the start of the investigation.
19 Q. And who were they?
20 A. The first one was Family Fitness Center.
21 The second one was End Term Planning. The third

1624

1 one was American Sports Medical Center. Fourth one
2 was Salon Chandon, C-H-A-N-D-O-N, Chandon.
3 The fifth was Diamond Billiards, and the
4 sixth was Regent International. They also had
5 couple of other names on the marquee associated
6 with the Suite 380, Regent International, Mission
7 Hills Development, Western Petroleum Imports.
8 Q. And you mentioned that there was a fitness
9 club; is that right?
10 A. Yes, sir.
11 Q. Were you a member of that fitness club?
12 A. Yes, I was.
13 Q. And when did you join it?
14 A. At the start of the investigation.
15 Q. Okay. Did you ever use the facility--
16 A. I don't have--yes, I did.

0615 Day 7

17 Q. How often did you use the facilities?

18 A. Half a dozen times.

19 Q. Did you ever see anyone from the fitness
20 club using the dumpsters?

21 A. Yes, I did.

1625

1 Q. Can you tell us exactly what you saw.

2 A. One particular morning when I arrived, I
3 saw a man coming up the stairs with a gym bag in
4 his hand and a water bottle in the other hand, and
5 as he passed the open--as he passed the doors to
6 the dumpster, which were open that particular day,
7 he tossed the water bottle into the dumpster.

8 Q. Okay. Now, when--let me ask you: The
9 pictures we just showed you and marked as exhibits,
10 who took those pictures?

11 A. I did.

12 Q. And when did you take them?

13 A. I--let me see. A few days ago. Let me
14 refer to my declaration here.

15 I believe it was June 12th, 2004.

16 Q. And when you took those pictures when you
17 arrived at the site, were the doors open?

18 A. One was partially open.

19 Q. Is that the--one of the pictures that you
20 took?

21 A. Yes.

1 Q. And which picture is that?

2 A. That would be 21, I believe.

3 Q. I think you must have it marked wrong.

4 Could you hold up?

5 MR. DUGAN: That's actually--for the
6 record, the witness is holding up what we've marked
7 as Exhibit X20.

8 THE WITNESS: Sorry.

9 BY MR. DUGAN:

10 Q. That's all right.

11 Now, I would like to direct your attention
12 to the picture with the two vans on it. It's been
13 marked as Exhibit X18.

14 A. My numbering's off, yes.

15 MR. DUGAN: The witness is holding up X18.

16 BY MR. DUGAN:

17 Q. Was it your experience in the course of
18 your work that cars or trucks were often parked in
19 that area with the striped lines?

20 A. Yes.

21 Q. Now, Mr. McAnish, did you have any

1 understanding about whether the work that you were
2 doing was legal?

3 A. I was told that it was legal, yes.

4 Q. And so it was your understanding that
5 everything you were doing was in accordance with
6 the law?

7 A. That's correct.

8 Q. Okay. And what was the basis for your
9 understanding?

10 A. The law firm that retained us was the one
11 that relayed the information to me that what I was
12 doing was legal.

13 Q. Now, did you talk with them directly?

14 A. No, I talked--Mr. Stirwalt actually dealt
15 directly with them, and he relayed the information
16 to me.

17 Q. Did you discuss with Mr. Stirwalt in
18 detail why the law firm believed that your
19 activities were legal?

20 A. No, not in detail.

21 Q. But just to reiterate, it was always your

1628

1 understanding that your activities were legal?

2 A. That's correct.

3 MR. DUGAN: I have no more questions.

4 PRESIDENT VEEDER: Thank you, Mr. Dugan.

5 Mr. Legum.

6 CROSS- EXAMINATION

7 BY MR. LEGUM:

8 Q. Mr. McAnish, my name is Bart Legum. I'm
9 an attorney with the NAFTA Arbitration Division of
10 the State Department, and I'll be asking you a few
11 questions this morning.

12 Did you draft your witness statement?

13 A. The declaration--would that be the
14 declaration of Patrick McAnish?

15 Q. Yes, sir, that's what I'm referring to.

16 A. Yes, I did.

17 Q. And that's your signature on the third
18 page?

19 A. That's correct.

20 Q. You signed that document on June 12th?

21 A. Yes.

1629

1 Q. It was in the early afternoon?

2 A. I believe so, yes.

3 Q. Do you have any understanding as to why
4 this document was not provided to the Tribunal or
5 the United States until after 5 p.m. the next day?

6 A. No, sir, I have no--I do not know why.

7 Q. Were you paid for your time on Saturday?

8 A. Yes, I was.

9 Saturday?

10 Q. Yes.

11 A. Was the 12th the Saturday?

12 Q. That's correct, yes.

13 A. Yes. Yes, I was.

14 Q. And are you being paid for your testimony
15 today?

16 A. Being taped?

17 Q. Are you being paid for your testimony
18 today?

19 A. Oh, paid.

20 Yes, I am.

21 Q. And it's Methanex that's paying your

1630

1 bills; is that correct?

2 A. Methanex, yes.

3 Q. I'm going to ask you--

4 A. Well, indirectly. I'm an independent
5 contractor, so I'm being paid by Jim Stirwalt.

6 Q. But it's your understanding that it's
7 Methanex that's ultimately paying him?

8 A. I don't get into the financial end of
9 things. I really don't know who is paying him,
10 whether it's the law firm or how that works.

11 Q. I'm going to ask you a number of questions
12 now about the process that you used in collecting
13 the documents during the course of your assignment.

14 You were located in Valencia; correct?

15 A. My home address? Or the company address?

16 Q. When you departed to go to 910 Birch
17 Street in Brea, did you leave from your home
18 address, or did you leave from your work address?

19 A. I left from my home address.

20 Q. And that's in Valencia; correct?

21 A. That's in Long Beach, California.

1631

1 Q. Long Beach is about 30 miles from Brea; is
2 that correct?

3 A. About 25, yes.

4 Q. You visited Mr. Vind's building every

5 weekday morning during your assignment; correct?

6 A. That's correct.

7 Q. And you arrived there around 6 a.m.; is
8 that right?

9 A. Between six and seven, yes.

10 Q. You traveled by car; is that correct?

11 A. That's correct.

12 Q. You left Long Beach around five a.m. every
13 day during the assignment; is that correct?

14 A. 5:30 would be more accurate. It's about a
15 30-minute drive.

16 Q. Where did you park when you arrived at 910
17 Birch Street?

18 A. In the parking area adjacent to the
19 dumpsters.

20 Q. So, you parked right out in front of the
21 building, in between the building and the hotel; is

1632

1 that correct?

2 A. That's correct.

3 Q. Was that temporary parking, or was
4 that--was it permissible to park there for longer
5 periods?

6 A. I think it's a green zone, so I think it's
7 like 30-minute parking. I'm not real sure. I
8 think they're a 30-minute parking limit, and
9 there's a couple of handicapped zones there, too.

10 Q. Now, when you used the health club, did
11 you park out front, or did you park somewhere else?

12 A. I parked out front.

13 Q. On arriving at the building, you left your
14 car and you approached those pink doors where the
15 dumpsters were located; correct?

16 A. I believe they're white doors, but yes.

17 Q. You opened the doors; is that right?

18 A. Sometimes I did, but sometimes they were
19 already opened.

20 Q. You stepped inside the area where the
21 dumpsters were located to decide what trash bags to

1633

1 take home; correct?

2 A. That's correct.

3 Q. You did not review what trash to collect
4 outside in the open, did you?

5 A. Actually, I did, because there was more
6 light there than--sometimes there was no light
7 inside the trash area, and they were so close to
8 the sidewalk that I actually would identify it from
9 the sidewalk generally.

10 Q. Now, did you ever review what trash to
11 collect while inside the building, inside that area
12 where the dumpsters were?

13 A. Yes, I did. I did. There were two
14 dumpsters.

15 Q. So, it's really--it's during the winter
16 months that you reviewed them outside on the
17 sidewalk; is that your testimony?

18 A. Yes. It was from both locations, sir. It
19 was from inside and outside. There was better

20 lighting outside.

21 Q. Now, all the trash bags in the bins were

1634

1 black; correct?

2 A. As a rule, yes. Some were white.

3 Occasionally there was white plastic.

4 Q. But as a rule, all of the bags were the

5 same make; correct?

6 A. Yes, yes.

7 Q. They were identical in appearance on the

8 outside?

9 A. For the most part, they looked like your
10 typical 30-gallon trash bag, yes.

11 Q. How did you identify the bags containing
12 Regent's trash?

13 A. I would tear them open.

14 Q. So, you looked through all of the bags?

15 A. I would look through the bags until I
16 found Regent's trash, discarded trash.

17 Q. How did you know when you found Regent's
18 trash?

19 A. There would be discarded documents in that
20 trash bag with the Regent title on it.

21 Q. Now, there was a medical doctor in the

1635

1 building. You mentioned that. That's correct,

2 isn't it?

3 A. I believe there was a laser vision
4 correction company there; TLC, I believe it was
5 called.

6 Q. So, you went through his trash as well as
7 Mr. Vind's trash in order to identify which trash
8 was which; correct?

9 A. That's correct, that's correct.

10 Q. How long did it take for you to identify
11 Regent's trash?

12 A. Less than five minutes.

13 Q. How many bags of Regent trash were there
14 typically?

15 A. Typically, there would be one, sometimes
16 more than that.

17 Q. And except when it was very dark, you
18 spent that time inside the building, inside the
19 closed doors, reviewing the trash; correct?

20 A. The doors were not closed. When I would
21 go in, I would leave them open for lighting, but

1636

1 sometimes they were already open.

2 Q. Now, at 6 a.m., there usually were not
3 many people around; correct?

4 A. The gym had some people, but generally,
5 no, there wasn't too many people around.

6 Q. Now, where was the entrance to the gym?

7 A. The gym was on the first floor of the
8 building, which was one--one floor down from the
9 parking area where I parked.

10 Q. Could you turn to Exhibit X17 and maybe

11 give us an idea from that photograph where the gym
12 was located.

13 A. The fifth vehicle, the van that is parked
14 in the cross-hatched zone, would be directly--it
15 would be directly left to that van down the
16 stairway, which is also directly to the left of
17 that van, the stairway there.

18 Q. Would that be where that--where the
19 closest of the two sculptures are?

20 A. Yes. That would be exactly where the
21 stairway is, yes.

1637

1 Q. So that's--

2 A. There is one on each side where the
3 sculptures--there is a stairway on each side of the
4 sculpture.

5 Q. The gym was located in the wing of the
6 building that was on the far side from where the
7 trash containers were located; correct?

8 A. No, it was in the--actually the main--it
9 took up the entire first floor, so--the building is
10 rather horseshoe-shaped, so it was in the center
11 and on both sides.

12 Q. But the entrance to the gym was in the
13 wing--the other wing of the building, not the wing
14 of the building where the trash was located;
15 correct?

16 A. No. It was straight ahead in the center
17 of the building.

- 18 Q. Then I'm not sure that I'm following you.
19 In this photograph, X--
20 A. Okay. If you went down--
21 Q. Please go ahead.

1638

- 1 A. If you went down those stairs, you would
2 walk straight ahead and to the entrance.
3 Q. So, the entrance is in the courtyard; is
4 that what you're saying? The courtyard of the
5 building?
6 A. No. It's at the other side of the
7 courtyard. It's a horseshoe-shaped building, and
8 it would be what I would designate the center of
9 the building, center of the health club, if you
10 could picture the health club wrapping around on
11 both sides. You would enter right at the top or
12 center of the building.
13 Q. And the entrance to the center of the
14 building is through the courtyard.
15 A. Yes.
16 Q. The middle of the horseshoe?
17 A. Yes.
18 Q. Now, 6 a.m. was before business hours for
19 the businesses in the building; correct?
20 A. The gym was opened. I believe it was a
21 24-hour gym.

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1 Q. Aside from the gym, 6 a.m. was before
2 business hours for the other businesses in the
3 building?

4 A. Yes, yes. Yes, sir.

5 Q. The cleaning service was not there at that
6 time; correct?

7 A. I did see the cleaning service for the gym
8 at that time. I ran into him a few--

9 Q. Please go ahead.

10 A. I ran into him. I ran into the cleaning
11 service for the gym area. I don't know if it was
12 the cleaning service or a gym employee. I ran into
13 him several times.

14 Q. But the cleaning services for the other
15 tenants of the building weren't there at that hour;
16 correct?

17 A. Correct.

18 Q. The tenants of the building, aside from
19 the gym, weren't there at that hour; correct?

20 A. It didn't appear that they were. I don't
21 know if somebody was behind their office doors or

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1 not, but I didn't see any activity in the other
2 offices.

3 Q. Mr. Vind's company wasn't open at that
4 hour, was it?

5 A. No.

6 Q. You chose that hour for your document
7 collection activities because that was when
8 Mr. Vind's company wasn't open; correct?

9 A. I chose that hour for the traffic
10 situation, actually.

11 Q. So, the fact that Mr. Vind and the other
12 tenants and the cleaning service for the other
13 tenants in the building weren't there at that time,
14 that had nothing to do with your decision?

15 A. That's correct.

16 Q. Now, did you encounter any members of the
17 public when you were inside the doors inside the
18 building where the trash dumpsters were?

19 A. Yes, I did.

20 Q. Who did you encounter?

21 A. The gym cleaning service or employee. He

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1 would come in and toss in bags into the dumpster.

2 Q. He was a cleaning service for the tenants
3 of the building, one of the tenants; correct?

4 A. I'm not sure whether he was an employee of
5 the gym or a cleaning service.

6 Q. Well, aside from that encounter with this
7 person from the cleaning service for the gym, did
8 you meet any other members of the public inside the
9 building in that area where the dumpsters were?

10 A. No.

11 Q. How big were the bags of trash that you
12 brought home with you?

13 A. They would vary in size from - well, I
14 guess most of the black bags were the
15 30-gallon-sized black trash can size or smaller.

16 They weren't all 30-gallon. There were some that
17 were smaller.

18 Q. And were they generally--

19 A. They appeared--

20 Q. I'm sorry.

21 A. They were the same color.

1642

1 Q. Were they generally pretty full?

2 A. It would vary.

3 Q. And correct me if I'm wrong, but I believe
4 you mentioned that there was typically only one bag
5 of Regent trash. Am I remembering you correctly?

6 A. Sometimes there were several--sometimes
7 there were several. On one occasion, I believe I
8 recovered somewhere in the neighborhood of
9 20 pounds of discarded documents.

10 Q. How did you transport the bags back to
11 your car?

12 A. I carried them in my hand.

13 Q. They weren't very heavy, then?

14 A. Well, 20 pounds is not too heavy, no.

15 Q. What time did you generally leave the
16 building after collecting the documents?

17 A. I would leave immediately, unless I went
18 to the gym.

19 Q. And what time would that be?

20 A. It would only take me about five minutes
21 to get the documents, as a rule, unless there was a

1 large quantity of them

2 So, the hours, like I said, varied between
3 six and seven, so it would be a short period. I
4 would say 10 minutes I was in and out, unless I
5 went to the gym

6 Q. What time of day did you arrive back in--I
7 guess you went to Valencia typically from--

8 A. No, I returned home.

9 Q. You returned--

10 A. I returned home.

11 Q. You returned back to Long Beach?

12 A. To Long Beach, that's correct.

13 Q. And then once you've got home, you
14 reviewed the trash?

15 A. That's correct.

16 Q. You didn't do that out in the open, did
17 you?

18 A. At my home?

19 Q. No. You didn't do that on the sidewalk,
20 for example, in front of the building?

21 A. No, other than to identify the bags.

1 Q. Right. You waited until you got home to
2 review the contents of the trash bags?

3 A. Beyond the initial identification, yes.

4 Q. You then determined what appeared to be
5 the relevant documents; is that correct?

6 A. That's correct.

7 Q. How did you do that?

8 A. I went through each and every discarded
9 document that was in the bag, and those with a
10 designation of the company, Western--Regent
11 International or Western Petroleum, if it had that
12 designation on it, I would just forward that.
13 That's what I would select.

14 Q. And if it didn't have that company name on
15 it, you wouldn't forward it?

16 A. If I didn't determine some relevance to
17 the company, I would discard it. For instance,
18 there were fliers and things that would be your
19 typical office trash that I did not forward.

20 Q. You only forwarded internal documents of
21 the company. You didn't forward documents that

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1 were available to the general public; is that
2 correct?

3 A. That's correct.

4 Q. You then sent the documents that you took
5 from the trash to the Washington, D. C. area;
6 correct?

7 A. Initially, they went to Virginia, McLean,
8 Virginia, and then after a couple of weeks I was
9 told to send them to Washington, D. C.

10 Q. So, the time you sent it to McLean,
11 Virginia, was a short period of time, to your
12 recollection?

13 A. It was a week or two, as I recall it.

14 It's been four years ago, and I believe--I would
15 say two weeks.

16 Q. But it wasn't as long as a month?

17 A. I don't recall it being as long as a
18 month.

19 Q. And the address in Washington, that was a
20 law firm that you sent it to?

21 A. Yes, sir.

1646

1 Q. How did you send it?

2 A. Federal Express.

3 Q. And did you do anything special in terms
4 of alerting the recipients of your packages to
5 important documents in the trash?

6 A. I didn't make that determination, no. I
7 would just forward--forward the trash in bulk.

8 Q. Did you catalog the trash before you sent
9 it on to them?

10 A. No.

11 Q. I would like to ask you some questions
12 about when you first started this assignment. You
13 started this job in August of 2000; correct?

14 A. Let me refer to my notes here.

15 Yes, I believe my first trip was
16 August 25th.

17 Actually, I show an August 23rd date.

18 Q. So, it was around August 23rd or
19 August 25th, 2000, when you started?

20 A. That's correct.

21 Q. How did you establish where Regent's trash

1647

1 was?

2 A. I looked for the dumpster. In fact, I
3 believe on the initial visit, the doors were open,
4 and it was easy to spot when I pulled in the
5 parking lot where the dumpsters were.

6 Q. Did you ever go into any other part of the
7 building aside from the area where the dumpsters
8 were and the health club?

9 A. Yes. I walked up to the office building
10 of Regent initially to see if there was any
11 additional names on the door of the business.

12 Q. Did you ever enter any other--that part of
13 the building again?

14 A. No, sir.

15 Q. Did you ever speak with anyone from
16 Regent?

17 A. No, sir.

18 Q. Did you ever speak with anyone from
19 Regent's cleaning service?

20 A. No, sir.

21 Q. And the only parts of the building that

1648

1 you went into were this area where the dumpsters
2 were maintained, and the health club; is that
3 correct?

4 A. That's correct.

5 Q. Now, in paragraph three of your
6 declaration, you say, and I quote, The dumpsters
7 were emptied by a truck which accessed the area
8 from the public parking area. Is that too fast?
9 Do you want me to read that again?

10 A. Did you say item three?

11 Q. Paragraph three. You say on page two:
12 "The dumpsters were emptied by a truck which
13 accessed the area from the public parking area. "

14 Do you see that?

15 A. Yes, I do.

16 Q. And did you observe the dumpsters being
17 emptied by a truck?

18 A. Yes, I did, on a couple of occasions.

19 Q. How often were the dumpsters emptied?

20 A. Once a week.

21 Q. And who emptied them?

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1 A. I couldn't say. It was a commercial
2 service of some type.

3 Q. So, the persons who arrived with the
4 truck, opened the doors, rolled the dumpsters out,
5 and emptied them into the truck; is that correct?

6 A. If the doors were closed, yes, but that's
7 correct.

8 Q. And then they immediately rolled the
9 dumpster back behind the doors and closed them; is
10 that correct?

11 A. Well, I only saw it on two occasions, and

12 I can't recall whether they closed the doors or
13 not.

14 Q. But you never saw the dumpster left
15 outside for any long period of time, did you?

16 A. No.

17 Q. The place where the trash collectors
18 collected the trash was from behind those doors;
19 correct?

20 A. That's correct.

21 Q. Now, Mr. Stirwalt retained you for this

1650

1 job; correct?

2 A. That's correct.

3 Q. And Mr. Stirwalt paid you?

4 A. That's correct.

5 Q. How much were you paid?

6 A. I believe the rate was around \$30 an hour,
7 but all total, my daily salary was around \$150 for
8 the--taking into consideration the time it took to
9 sort the trash, mail it, drive time, et cetera. It
10 was around \$150 a day.

11 Q. So, you were paid on an hourly basis?

12 A. It was a--yes, I am paid on an hourly
13 basis.

14 Q. Now, did you ever have any conversations
15 with members of the law firm?

16 A. Not that I recall.

17 Q. Do you know the name of the law firm?

18 MR. DUGAN: Objection. That's irrelevant.

19 It's not probative of anything.

20 PRESIDENT VEEDER: I think the question
21 could be asked if he knows the name of the law

1651

1 firm, but don't answer the next question until
2 Mr. Dugan has an opportunity to object. You are
3 being asked, do you know the name of the law firm?
4 Please don't for the moment identify the name of
5 the law firm.

6 THE WITNESS: No, I don't recall the name
7 of the law firm.

8 BY MR. LEGUM:

9 Q. Did you ever--did you know who the firm
10 was in McLean, Virginia, that you were sending the
11 documents to originally?

12 A. I believe that was Control Risk Group.

13 Q. Did you ever speak to anyone from there?

14 A. I don't recall if I did or not.

15 Q. Just so the record is clear, you did send
16 documents to the law firm in Washington; is that
17 correct?

18 A. Yes, that's correct. That's correct.

19 Q. Now, did you speak with Mr. Stirwalt about
20 this assignment?

21 A. Yes.

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1 Q. How often did you speak with him?

2 A. Maybe once a week.

3 Q. What were your conversations on?

4 A. Basically my hours. That's about what it
5 revolved around. We didn't get into the contents
6 of the trash or anything like that.

7 Q. So, it was on administrative matters such
8 as how much to bill for your services?

9 A. Yes, yes, that's correct.

10 Q. Did you ever speak with Mr. Stirwalt about
11 what you were doing? I withdraw that question.

12 It's a bit too broad.

13 Did you ever speak with Mr. Stirwalt about
14 the document collection methods that you were
15 using?

16 A. Yes.

17 Q. When did you speak with him on that
18 subject?

19 A. I don't recall.

20 Q. Was it at the beginning of the assignment?

21 A. I would--yes, I believe we had several

1653

1 conversations at the start of the assignment,
2 regarding where to send the documents. He provided
3 that information, the method of sending them, that
4 type of thing.

5 Q. Do you have any other conversations, aside
6 from where to send the documents, about the methods
7 you were using for collecting the documents?

8 A. I don't recall, actually.

9 Q. How about conversations about where you

10 were collecting the documents from?

11 A. Yes, I had conversations regarding that.

12 Q. When were those conversations?

13 A. Well, they were probably

14 initial--initially when I started it, he asked for

15 kind of a verbal description of the location and

16 where the dumpsters were located, and I gave him

17 that.

18 Q. Did you have any subsequent conversations,
19 aside from that one, on that subject?

20 A. As to the dumpster locations?

21 Q. Correct.

1654

1 A. I don't recall.

2 Q. Now, you referred to advice from a law
3 firm, under examination by Mr. Dugan. Can you tell
4 me when that conversation took place.

5 A. I believe it was in the early part of the
6 investigation. I can't remember the exact date,
7 but I didn't talk to them directly. I received my
8 information through Mr. Stirwalt.

9 Q. And what did Mr. Stirwalt tell you?

10 A. That it was the law firm's opinion that
11 what we were doing was legal.

12 Q. And was that good enough for you?

13 A. That was good enough for me.

14 Q. Ever heard of Robert Puglisi?

15 A. No.

16 Q. How about M Cherry and Associates?

17 A. No.

18 Q. Terry Dunne?

19 A. That sounds familiar, but I'm not sure.

20 Q. Did you ever have any communications with

21 either Mr. Puglisi or Mr. Dunne or M Cherry and

1655

1 Associates about this assignment?

2 A. I--I just don't recall.

3 Q. Now, you testified under examination by

4 Mr. Dugan that you became a member of the health

5 club at 910 Birch Street; is that correct?

6 A. That's correct, that's correct.

7 Q. Did you personally pay for your

8 membership, or was that an expense that was

9 reimbursed as part of this job?

10 A. I paid for it, and I was reimbursed.

11 Q. Why was it that you became a member?

12 A. I believe it was under Mr. Stirwalt's

13 instructions to provide a legitimacy for my being

14 there.

15 Q. So, it was to become--provide some cover

16 in the event that someone asked you what you were

17 doing there; is that correct?

18 A. I don't know I would use the term "cover,"

19 but yes.

20 Q. Now, members of the health club are

21 essentially clients of the health club; correct?

1656

1 A. I don't know how you would interpret that.

2 Q. Well, is it your understanding that by
3 becoming a member you became a part-owner of the
4 health club?

5 A. No.

6 I see your point.

7 Q. This was not a cooperative health club;
8 correct?

9 A. Correct.

10 Q. Members of the health club had no
11 responsibility for taking out the health club's
12 trash, did they?

13 A. No responsibility, no.

14 Q. And, in fact, there was a cleaning service
15 that the health club hired to take out its trash;
16 is that correct?

17 A. I really don't know. As I said before, I
18 ran into an individual a few times. Whether he was
19 a member of the health club or part of the cleaning
20 service, I don't know.

21 Q. I would like to refer you to what's been

1657

1 marked as X22. This is the relatively close-up
2 photograph of the two dumpsters.

3 A. Would that be this one?

4 Q. That's right. That's X22.

5 Now, so far as you can tell, those are the
6 same waste bins that were there when you were
7 conducting this assignment; correct?

8 A. That's correct.

9 Q. And you never were an owner of those bins,
10 were you?

11 A. I'm sorry, what was that?

12 Q. You were never an owner of those bins,
13 were you?

14 A. No.

15 Q. You never worked for or represented the
16 owner of those waste bins, did you?

17 A. No.

18 Q. You were not an employee of the City of
19 Brea; correct?

20 A. Correct.

21 Q. The City of Brea never authorized you to

1658

1 conduct business as a trash collector or a
2 salvager; correct?

3 A. Correct.

4 Q. And you never worked for any person or
5 company who was authorized to conduct the business
6 of trash collection or salvaging; correct?

7 A. Well, I worked for Mr. Stirwalt, and as I
8 said before, it was determined that I can collect
9 trash legally, so I guess you could say I worked
10 for Mr. Stirwalt collecting trash.

11 Q. Now, is it your understanding that the
12 City of Brea authorized Mr. Stirwalt to become a
13 trash collector?

14 A. No, that's not my understanding.

15 Q. And is it your understanding that the City

16 of Brea authorized him to become a trash salvager?

17 A. No.

18 Q. You did remove some of the contents of

19 these waste bins; correct?

20 A. Correct.

21 Q. And you did that every weekday between

1659

1 late August 2000 and February 2001; correct?

2 A. Correct.

3 Q. Now, Mr. McAnish, you are aware that an

4 issue has arisen in this case as to whether what

5 you did violated Brea City Code provisions;

6 correct?

7 A. Correct.

8 Q. What was your response to that?

9 A. Again, it was--I was--the information I

10 was given that what I was doing through

11 Mr. Stirwalt, that what I was doing was legal.

12 Q. Did look at the Brea City Code yourself?

13 A. Briefly.

14 Q. And what did you conclude based on that

15 brief review?

16 A. Nothing. I forwarded it to Mr. Stirwalt.

17 Q. The building at 910 Birch Street was a

18 private building; correct?

19 A. I don't know.

20 Q. Well, was it owned by the state?

21 A. I don't know.

1 Q. Was it owned by the city government?

2 A. I don't know.

3 Q. Now, it did have some areas that are
4 commonly accessible to the public; is that correct?

5 A. Yes.

6 Q. You referred earlier to the entrance to
7 the building which led into a lobby area; is that
8 correct?

9 A. I guess you could call it a lobby. It was
10 actually a check-in desk.

11 Are you talking about the gym now?

12 Q. Well, let's clarify that. There was the
13 gym which was below ground level; correct?

14 A. Correct.

15 Q. And then on ground level there was a
16 lobby; is that right?

17 A. No, it was not. It's just a walkway.

18 Q. Was there a common area that visitors
19 entered to access the office buildings--excuse me,
20 the offices in the building?

21 A. Yes. A common area--there was a walkway

1 on each floor. You would enter on the--actually
2 the second floor of the building, and there was a
3 walkway around the entire building in a horseshoe
4 shape on the second and third floors, which would
5 be street level and one above.

6 Q. I see. So, if we can return to X18
7 again--excuse me, X17--do you have that in front of
8 you?

9 A. Yes, I do.

10 Q. Now, is it that the access to the offices
11 of the tenants in the building was on the outside
12 through these walkways that we can see in this
13 photograph?

14 A. That's correct. That's correct.

15 Q. And there was a courtyard that members of
16 the public could walk into in order to access those
17 walkways; is that correct?

18 A. Just on the gym floor, the lower level,
19 there was a courtyard.

20 Q. You described this as a horseshoe-shaped
21 building. The part that was in the middle of the

1662

1 horseshoe, would you describe that as a courtyard,
2 or how would you describe that?

3 A. Correct, correct, yes, I would describe
4 that as a horseshoe.

5 Q. Now, where was the directory of tenants
6 located that you photographed?

7 A. Well, if you refer back to 17, you will
8 see a--I would say the best explanation would be
9 the wall on the other side of both of the statues.
10 Those are the entrance areas, and right there is an
11 elevator on each side going to all the floors.
12 Behind each statue, there is an elevator. You
13 could see the entrance to the left and to the

14 right. The archway there, and the elevators. The
15 directory is adjacent to the elevator on each side.

16 Q. So, if a member of the public wanted to
17 visit one of the buildings--excuse me, one of the
18 businesses, they would either take the elevator or
19 they would take the stairs and the walkway; is that
20 correct?

21 A. That's correct. That's correct.

1663

1 Q. Now, is it your understanding that there
2 were parts of the building that were not commonly
3 accessible to members of the public?

4 A. I don't think I ever gave it much thought.
5 I don't know if that answers your question.

6 Q. Well, it's not your view that every part
7 of the building was commonly accessible to the
8 public, was it?

9 A. Well, I would say that it is accessible to
10 the public, every part of the building.

11 Q. But you don't commonly see members of the
12 public in some parts of the building; is that
13 correct?

14 A. If you're talking about internal parts of
15 the building, no, I wouldn't be able to see that,
16 but I'm not sure I understand your question.

17 Q. Well, for example, the offices that were
18 in the building, it's your understanding that there
19 were parts of that that were accessible to the
20 public and parts that were not; correct?

21 A. Oh, sure, as far as the offices,

1664

1 individual offices, yes.

2 Q. Now, were there any other entrances to
3 this building?

4 A. The only ones I was aware of was the ones
5 from the parking lot area.

6 Q. Were there any other doors on the outside
7 of this building?

8 A. Again, I can only say around the parking
9 area. I didn't ever--I never walked around on the
10 street side. I don't know if there were other
11 entrances or not.

12 Q. Now, you testified earlier that you
13 reviewed an ordinance from the Brea City Code.

14 A. I didn't actually review it. I just saw
15 the cover sheet, basically. I didn't get into the
16 content too much.

17 Q. Where did you get that from?

18 A. I believe it was the city--some city
19 office. I can't recall just which one, but one
20 that would deal with the municipal codes.

21 Q. So, you went by a city office and got the

1665

1 ordinance from a city office? Is that what you're
2 saying?

3 A. That's--that's correct.

4 Q. When did you do that?

5 A. I believe it was the first--initially--the
6 initial part of the investigation.

7 Q. And which office did you go to?

8 A. I don't recall. It was the city office
9 that would--it's been four years. I can't recall,
10 but it was someone that had the municipal codes for
11 the City of Brea.

12 Q. And what did you ask them about?

13 A. I asked them if they had any municipal
14 codes relating to trash collection, and they told
15 me they had, and they showed me what they had. And
16 I believe they made me a Xerox copy of the
17 pertinent sections.

18 Q. And what did this section that you had a
19 photocopy of say?

20 A. I told you, I just briefly looked at the
21 head--the title, but didn't really get into the

1666

1 ordinance itself.

2 Q. And what was the title?

3 A. I don't recall. Something to do with
4 trash collection.

5 Q. Did you tell the city office what you were
6 planning on doing?

7 A. No.

8 Q. One moment, please.

9 (Pause.)

10 Q. Just a couple more questions, Mr. McAnish.

11 What prompted you to go to that city

12 office?

13 A. I was directed to go there by
14 Mr. Stirwalt.

15 Q. Did he tell you why he thought it was
16 useful for you to go there?

17 A. Apparently somebody had--had requested the
18 ordinance. I think it was someone from the law
19 firm that had requested the ordinance, and it was
20 relayed to me through Mr. Stirwalt to do that. He
21 had someone request it of him.

1667

1 Q. So, was this after you stopped sending
2 documents to Control Risk Systems and began sending
3 them to the law firm?

4 A. I really don't recall whether it was--I
5 recall it being at the initial part of the
6 investigation. I couldn't--I can't recall. I
7 can't answer that clearly.

8 Q. And what did you do with the ordinance
9 after you've got this photocopied?

10 A. I either faxed it or mailed it to
11 Mr. Stirwalt.

12 Q. Did you have any further conversations
13 about it after that?

14 A. Yes, he had told me that the law firm had
15 determined that what I was doing was legal, based
16 on that ordinance.

17 Q. And Aside from that conversation, any
18 further conversations concerning this ordinance?

19 A. I don't recall any further conversations.
20 MR. LEGUM: I have no further questions.
21 PRESIDENT VEEDER: Thank you, Mr. Legum

1668

1 Mr. Dugan?

2 MR. DUGAN: Could we take a two-minute
3 break and then just come back? I may have one
4 question.

5 PRESIDENT VEEDER: We are going to take a
6 two-minute break. Please stay where you're
7 sitting, if you possibly can. Can you hear me?

8 THE WITNESS: Can I get a cup of coffee?

9 PRESIDENT VEEDER: Yes, you can. But can
10 you just come back to the chair? We need to see
11 your face. Just sit down for two seconds.

12 We say this to all our witnesses. When we
13 break, please do not discuss your evidence away
14 from the Tribunal, so, please take a cup of coffee,
15 but please don't talk about your evidence to
16 anybody. Do you understand that?

17 THE WITNESS: Yes, I do.

18 PRESIDENT VEEDER: We will come back in
19 two minutes. Thank you very much.

20 (Brief recess.)

21 PRESIDENT VEEDER: Let's resume.

1669

1 Mr. Dugan?

2 MR. DUGAN: I have no further questions on
3 direct.

4 QUESTIONS FROM THE TRIBUNAL

5 PRESIDENT VEEDER: Mr. McAnish, we have
6 some questions from the Tribunal, and the first is,
7 to the best of your recollection, how many Fed Ex
8 packages did you send to the law firm in
9 Washington, D. C. ?

10 THE WITNESS: I would just put a guess at
11 over a hundred.

12 PRESIDENT VEEDER: And in each case, did
13 you fill out the address of the law firm with the
14 name of the law firm?

15 THE WITNESS: I believe I directed it to
16 an individual at an address.

17 PRESIDENT VEEDER: Was the name of the law
18 firm part of that address?

19 THE WITNESS: I don't think I used the--I
20 don't believe I used the name of the law firm. I
21 addressed it to a specific individual at the law

1670

1 firm address.

2 PRESIDENT VEEDER: Now, the second
3 question relates to your declaration, and if you
4 could turn to paragraph five on page two, you there
5 state that early in October you learned that Regent
6 International would be moving early in 2001 to
7 another building too far away. And then you say,
8 in order to determine whether or not we would be
9 able to continue to retrieve documents at the new

10 Regent location, you visited, in October 2000, the
11 new location, and we understand you took a
12 photograph; is that right?

13 THE WITNESS: That's correct. That's
14 correct.

15 PRESIDENT VEEDER: Now, when you say "we,"
16 who is "we," apart from yourself?

17 THE WITNESS: Bonanza Investigations. Jim
18 Stirwalt.

19 PRESIDENT VEEDER: Did you discuss this
20 with anybody else?

21 THE WITNESS: No.

1671

1 PRESIDENT VEEDER: Do you understand
2 whether Mr. Stirwalt discussed this new location
3 with the law firm?

4 THE WITNESS: I believe he did.

5 PRESIDENT VEEDER: And what did you
6 understand was the response of the law firm itself
7 to this new location and what you knew about it?

8 THE WITNESS: That it was questionable
9 that this location--it would be--it wouldn't be
10 legal to do what I was doing at the other location,
11 at the new location, because it was designated "No
12 Trespassing."

13 PRESIDENT VEEDER: Could you turn to
14 paragraph one of your declaration, please, page
15 one, and turn to the last sentence. And you say
16 there that in August 2000 Jim Stirwalt contacted me

17 to undertake a long-term surveillance and recovery
18 of discarded material from the common dumpsters
19 located at the address in Brea.

20 Mr. McAnish, you described your operations
21 in regard to the recovery of discarded material.

1672

1 What were your operations in regard to long-term
2 surveillance?

3 THE WITNESS: Basically, business hours,
4 when the business would open. That would come
5 under the surveillance. I didn't--it didn't open
6 during the time I was there. It's just a general
7 term we used. It doesn't always mean that we're
8 sitting there watching somebody. It's kind of a
9 designation that's used for the overall case.

10 PRESIDENT VEEDER: Apart from ascertaining
11 when the business was open, what else did it
12 involve, if anything?

13 THE WITNESS: The surveillance portion?

14 PRESIDENT VEEDER: Correct.

15 THE WITNESS: Well, you could say that
16 when I went to the Sherwood Professional Center,
17 that was part of the surveillance on the other
18 location, just what I observed regarding the case.
19 It comes under the term surveillance.

20 PRESIDENT VEEDER: Mr. McAnish, as you may
21 know, your evidence is directed to eight disputed

1673

1 documents which have been introduced by Methanex as
2 part of their evidential case in this arbitration,
3 and their evidence is that these eight documents
4 were amongst many documents that you sent by
5 Federal Express to the law firm and previously
6 possibly to Control Risks.

7 THE WITNESS: That's correct.

8 PRESIDENT VEEDER: Have you got before you
9 those eight documents?

10 THE WITNESS: No, I do not.

11 PRESIDENT VEEDER: Let me just put the
12 point to you baldly is that four of those
13 documents--

14 THE WITNESS: Oh, excuse me, sir. I
15 have--I do have them. Let's see if I have eight of
16 them here. I have four that I--five, six. I
17 believe I have six of those--actually what I have,
18 a couple of these are--one of them I wrote. One of
19 them apparently somebody at the law firm wrote
20 about receiving these materials. I don't know if
21 these are the same documents you're speaking of.

1674

1 It has--they have to do with the move itself from
2 one location to another. Are those the documents
3 you're talking about?

4 PRESIDENT VEEDER: I think not. I think
5 we are talking about different documents.

6 THE WITNESS: I don't have them.

7 PRESIDENT VEEDER: Let me just tell you

8 what we can see from the documents. Of the eight
9 documents in dispute, which were collected
10 apparently between August of 2000 and February of
11 2001 by you, of those eight documents, four bear
12 dates of 1997.

13 Now, does that strike any recollection
14 with you?

15 THE WITNESS: I don't know that I paid a
16 whole lot of attention to the dates on the
17 documents. Basically, if it had some reference to
18 Regent or Western Petroleum, that's all that I
19 needed to see. I don't recall paying specific
20 attention to dates.

21 PRESIDENT VEEDER: Let me ask you another

1675

1 question about another document, which is an
2 address book. It looks as though it's a printout
3 from a Palm notebook printed out on the computer.

4 Do you recall this address book at all?

5 THE WITNESS: No.

6 PRESIDENT VEEDER: And the other document,
7 which is quite a bulky document, we can show you
8 the original, it's a collection of phone messages.
9 It's a message book.

10 Can you recall that document at all?

11 THE WITNESS: I do recall a message book,
12 yes.

13 PRESIDENT VEEDER: If it's available,
14 we'll hold it up.

15 Mr. Dugan is holding up the phone message
16 book, which is our Exhibit 258, Tab 30.

17 Do you see, Mr. Dugan?

18 THE WITNESS: Yes, I see it.

19 PRESIDENT VEEDER: Do you recognize it at
20 all?

21 THE WITNESS: No. I'm sure if it was in

1676

1 the trash, it was what I collected, but there was
2 such a volume ever trash. I do remember something
3 about a book like that. I believe it had yellow
4 pages inside of it.

5 Yes, yes, I recognize those.

6 MR. DUGAN: Could we just let the record
7 reflect that the pages are, indeed, yellow.

8 PRESIDENT VEEDER: Yes.

9 ARBITRATOR REISMAN: Mr. McAnish, I have
10 some questions for you. The pictures you took on
11 this past week, which were submitted to the
12 Tribunal, have the doors to the dumpster area open
13 at different angles.

14 Did you adjust them for different
15 pictures?

16 THE WITNESS: Yes, yes, I did. When you
17 see them fully open, I did that so you could
18 actually see the dumpsters positioned inside the
19 trash area.

20 ARBITRATOR REISMAN: Were the doors closed
21 when you first came to take the pictures?

1677

1 THE WITNESS: No. The one was ajar. Let
2 me see if I could find which one.

3 I believe it's number 20. That's how I
4 found it originally--I have two of them labeled 20
5 here, but the two that show it open approximately
6 18 inches were how I found it that day, on the
7 12th.

8 ARBITRATOR REISMAN: So, document Number
9 16 is one in which you would open the doors wider
10 for the photograph?

11 THE WITNESS: I mislabeled them, so I will
12 hold up what I'm talking about. This is the closes
13 view of the doors, and it shows them ajar
14 approximately 18 inches. That's how I found it on
15 that day. There's two other photos that show--

16 ARBITRATOR REISMAN: You're holding up
17 Exhibit 20. You're holding up Exhibit 20. That's
18 for the record.

19 THE WITNESS: Right. That's one that I
20 got labeled right.

21 ARBITRATOR REISMAN: Exhibit 16, if you

1678

1 can briefly check the numbering.

2 THE WITNESS: Yes.

3 ARBITRATOR REISMAN: There you had
4 adjusted the doors. You'd opened it wider than
5 where you found it?

6 THE WITNESS: That's correct.

7 ARBITRATOR REISMAN: Thank you.

8 PRESIDENT VEEDER: Are there any questions
9 from the parties as a result of the questions from
10 the Tribunal?

11 MR. DUGAN: Could I just--

12 MR. LEGUM: No, Mr. President.

13 PRESIDENT VEEDER: Mr. Dugan?

14 MR. DUGAN: I have one question.

15 PRESIDENT VEEDER: Of course.

16 REDIRECT EXAMINATION

17 BY MR. DUGAN:

18 Q. Mr. McAnish, you mentioned at one point
19 during your recovery of the documents there was a
20 large quantity of documents, 20 pounds of
21 documents. Do you recall that?

1679

1 A. That's correct. Yes, I do.

2 Q. Was that an unusually large amount of
3 documents to show up in the trash on that one
4 occasion?

5 A. Yes.

6 Q. You don't recall the dates of those
7 documents, do you? Does it refresh your
8 recollection?

9 A. No.

10 Q. So, you don't recall any of the dates even
11 in that large discard of documents?

12 A. Well, they're--I believe it was collected

13 on 10/10/2000.

14 Q. Did it appear to you that Regent
15 International might have been clearing out their
16 files on the date when there was that large
17 quantity?

18 A. Yes, yes.

19 Q. And you mentioned that the date was 10/10.
20 Do you recall what the date of the move was?

21 A. I believe about the middle of February.

1680

1 MR. DUGAN: Okay. I have no further
2 questions.

3 PRESIDENT VEEDER: Mr. McAnish, we have
4 come to the end of the questions. The Tribunal
5 thanks you for extending yourself as a witness
6 today.

7 THE WITNESS: Thank you.

8 PRESIDENT VEEDER: We have now concluded
9 this video testimony.

10 THE WITNESS: Thank you.

11 (Witness steps down.)

12 PRESIDENT VEEDER: I suggest we take a
13 short break now. And after the break, under our
14 present plans, it will be to hear Mr. Dugan
15 conclude his oral submissions in response to the
16 U.S. motion. Let's break for 10 minutes.

17 (Brief recess.)

18 PRESIDENT VEEDER: Let's resume.

19 Mr. Dugan.

20 MR. DUGAN: Thank you very much.

21 Members of the Tribunal, the first point

1681

1 I'd like to start with is what I think the
2 testimony now has quite clearly established, which
3 is that when the documents were being collected,
4 they were being collected by people who thought
5 that they were operating in accordance with the
6 law. They were operating in good faith in that
7 sense, and that they took reasonable steps to
8 ensure that they were operating, including
9 obtaining a copy of the Brea City Code, doing an
10 analysis, and obtaining a legal opinion to the
11 effect that the collection of the discarded
12 documents was legal. And I think that that
13 conclusively establishes, if nothing else, the
14 intent Methanex and the individuals involved to
15 stay within the law, which I think is a very
16 important--an important showing.

17 Secondly, I think that is further
18 reinforced by the fact by the evidence in the
19 record now, in essence uncontested evidence in the
20 record, that when they were confronted with the
21 situation, where they believed that the

1682

1 circumstances had changed and that it was no longer
2 legal to obtain the documents, they ceased
3 obtaining the documents, which further supports the

4 showing that Methanex was certainly doing
5 everything it could to stay within the bounds of
6 the law.

7 Secondly, I know that Mr. Dunne did not
8 testify, did not put in a witness statement, but we
9 believe that there is sufficient evidence
10 independent of Mr. Dunne to establish the bona
11 fides of the documents that he produced. We have
12 the testimony of Mr. Puglisi. We know that
13 Mr. Dunne exists because of the evidence of
14 his--the records from California that show that he
15 exists. Mr. Stirwalt has talked to him. And the
16 evidence from Mr. Stirwalt and Mr. McAnish, we
17 believe, corroborates what Mr. Puglisi said about
18 what Mr. Dunne told him.

19 In addition, we think the documents
20 themselves, the ones that bore visible marks of
21 coffee, for example.

1683

1 PRESIDENT VEEDER: We will have the same
2 query. Are you referring to the short telephone
3 conversation we just heard about between
4 Mr. Stirwalt and Mr. Dunne?

5 MR. DUGAN: Yes, just simply to establish
6 the fact that Mr. Dunne does, indeed, exist and was
7 associated with this case. That was the name that
8 we gave you some time ago. We did track him down.
9 I think the independent phone call to Mr. Stirwalt
10 further corroborates the fact that he was the

11 investigator who was involved.

12 PRESIDENT VEEDER: Coming back to
13 Mr. Dunne, the evidential difficulty you have is
14 paragraph five in Mr. Puglisi's second affidavit,
15 which simply doesn't square with what we've heard
16 about the second operation between August 2000 and
17 February of 2001.

18 MR. DUGAN: I agree with that, and the
19 problem was that when Mr. Puglisi gave that, he was
20 operating on the basis of a faulty recollection
21 from six years ago. He hadn't talked to Mr. Dunne.

1684

1 He hadn't refreshed his recollection.

2 PRESIDENT VEEDER: Mr. Dugan, how do we
3 know that's faulty from the evidence we have before
4 us?

5 MR. DUGAN: I think that the--that the
6 layout of the building is now quite clear, and we
7 don't dispute that, and I think that the methods of
8 operation of collection have now been fairly well
9 established, and I think it's certainly possible
10 for the Tribunal to infer that the methods used by
11 Mr. Dunne were similar to the methods used by
12 Mr. McAnish. There is certainly no reason to
13 believe there were anything other than--

14 PRESIDENT VEEDER: You recognize that to
15 do that, we have to reject the evidence of your own
16 witness, paragraph five, Mr. Puglisi's second
17 declaration?

18 MR. DUGAN: Yes, we are willing to

19 withdraw that evidence on the grounds that it was
20 based on a faulty recollection. I think it was
21 quite clearly based on a recollection. I think

1685

1 Mr. Puglisi made that clear.

2 But I think, again, the independent
3 corroborating events are the fact that these came
4 from the trash, again the coffee stains that the
5 Tribunal itself has seen, and the testimony of how
6 the recordkeeping was effectuated when the
7 documents came in, and again the hearsay evidence
8 from Mr. Puglisi that these were obtained from the
9 same dumpsters. I think all corroborates and all
10 supports the idea that these were obtained
11 justifies as legally by Mr. Dunne as they were by
12 Mr. McAnish.

13 So, Methanex would submit that the same
14 analysis applies, that there is sufficient evidence
15 in the record for the Tribunal to conclude that
16 both sets of documents were obtained legally.

17 Now, with respect to the question that you
18 asked yesterday about whether or not there was a
19 trespass here, we take the position that there was,
20 in fact, no trespass whatsoever because this was a
21 common area, it was accessible to the public. It

1686

1 was in a commercial area, not a residential area.

2 It was in an area where people walk by, and most
3 importantly, because it was not marked, it was not
4 posted.

5 And I would like to read to you, if I
6 could, from the first case I gave you, which is the
7 Navratil case versus Smart, and if you could turn
8 to page five of that case, please. And you will
9 see starting in the second paragraph, the paragraph
10 that begins with the three stars. I'm sorry, you
11 must have the--oh, excuse me.

12 I'm sorry, it's on page three, right-hand
13 column. And it's halfway down, it's the quotation
14 in the middle of the paragraph that begins, "In
15 defining." We could do the whole paragraph. "In
16 defining the legal criteria for finding a trespass,
17 the trial court correctly stated to be a trespasser
18 it has to be shown that the party entered the
19 premises, despite evidence indicating the desire of
20 the owner to maintain the privacy of his premises
21 or where the property is such that the intruder

1687

1 would be well aware that the entry would be against
2 the owner's wishes. An example of the latter would
3 exist in the case of a private yard or estate where
4 residence is located. However where the owner of
5 the property attempts to attract business patrons,
6 the owner's intention in restricting activity must
7 be clearly manifested to the public. This can be
8 done by erecting fences or maintaining other

9 restraining devices which evidence the owner's
10 intent to limit entry on his property. "

11 Now, Methanex submits that that is the
12 controlling criterion, and that if the Tribunal
13 will compare what happened here in the second
14 instance, where the owner did manifest a clear
15 intention for people to keep out, Methanex kept
16 out.

17 ARBITRATOR ROWLEY: Could I just test you
18 on that. If by this authority you are suggesting
19 that we can infer that the doors to the dumpster
20 area, or are you suggesting that the doors to the
21 dumpster area should be treated in the same way we

1688

1 are to treat the doors to the elevator or the
2 stairways to the elevated walkway because that's,
3 in effect, where you have to go?

4 MR. DUGAN: Yes, and that's exactly what
5 I'm asserting, in a public area where you have a
6 number of doors that are not marked, "No
7 Trespassing. "

8 ARBITRATOR ROWLEY: Have you got better
9 authority than this to suggest that that
10 distinction or lack of distinction is valid?

11 MR. DUGAN: No, I think this is probably
12 the best authority that we have.

13 But again, I mean, there is no doubt that
14 the--where the dumpsters were was a common area.
15 It was in a publicly accessible place. It was
16 right next to the sidewalk. There were numerous

17 doors in the building that people could go in, and
18 in the absence of a clear manifestation for the
19 public to stay out, we believe that the public
20 could enter that area without committing a
21 trespass.

1689

1 ARBITRATOR ROWLEY: You see the difficulty
2 I have, frankly, Mr. Dugan, is that that garbage
3 collection area was intended for use by the tenants
4 of the building. I don't see how you can suggest,
5 if you are, that it was intended for use by the
6 general public.

7 MR. DUGAN: Well, I think whether it was
8 intended for use by the general public is not the
9 criterion. I think the criterion is whether it was
10 accessible to the public, both from a reasonable
11 expectation of privacy point of view, number one;
12 and number two, from a trespass point of view. If
13 it's accessible to the public in a generally public
14 area, and it's not marked as nonpublic, then
15 regardless of what it was intended for, no trespass
16 is committed when a member of the public goes into
17 a common area in an otherwise public environment.

18 ARBITRATOR ROWLEY: Thank you.

19 MR. DUGAN: The second authority that I
20 would like to draw your attention to is the second
21 case in the bundle that we gave you, the St. Louis

1 County case. If you turn to page four, right-hand
2 column, second paragraph, "In such instance where a
3 person enters a public or common area, there is no
4 intrusion or trespass because the person is clothed
5 with the implied consent of the owner or possessor
6 of the property. It would be ludicrous for a
7 member of the public to seek out the express
8 consent of the owner to enter an area already open
9 to the public. Implied consent can be shown from
10 custom, usage, or conduct, and it continues until
11 revoked as stated above."

12 Now, the third case--

13 PRESIDENT VEEDER: I'm just looking for
14 the facts of the case. Can you help us with what
15 issue was there.

16 MR. DUGAN: I believe that was a case
17 involving an abortion clinic and whether the--I
18 think in that case it was an abortion clinic that
19 had--that had had a number of--a certain amount of
20 trouble with protesters. There were, I believe,
21 "No Trespassing" signs posted, although not in a

1 place where they were visible--yes, there were "No
2 Trespassing" signs posted, but they were not
3 visible to the parties in the case, and they were
4 inside the building in a public area inside the
5 building.

6 So, even though there were "No

7 "Trespassing" signs, because they weren't visible,
8 the Court found that no trespass had been committed
9 here.

10 And I think if the "No Trespassing" signs
11 had been visible to the parties here, the Court
12 would have found to the contrary. So, again, I
13 think it supports the basic proposition that in a
14 public area--

15 PRESIDENT VEEDER: If you look at the top
16 of page two, second column, first paragraph, last
17 sentence, there seems to be an important
18 distinction between Ms. Macdonald being inside the
19 building to which the public had access, and then
20 there is no evidence that either one was inside any
21 of the businesses.

1692

1 Do you see that last sentence?

2 MR. DUGAN: I do see that, and perhaps I
3 misspoke. I thought one of them had been actually
4 inside the offices, not inside the clinic, but
5 inside the--yes, it says Ms. Macdonald was arrested
6 inside the building, when she was told to leave and
7 said that she would not do so.

8 So, that's just above the sentence that
9 you read, Mr. Veeder. So, apparently she was
10 inside the building in a common area, but not
11 inside any of the businesses.

12 And I think the analogy here is quite
13 clear, that the investigators here went into a
14 common area just like Ms. Macdonald did. They did

15 not go inside any of the businesses, but they were
16 in an area that was common to all the tenants in
17 the building. And because it was common to all the
18 tenants in the building, it was a publicly
19 accessible area, as to which there's an implied
20 license to anyone who enters it, an implied consent
21 to anyone who enters it.

1693

1 Now, had they gone into one of the
2 businesses, had they gone into Regent
3 International, that would be different, but they
4 didn't.

5 ARBITRATOR ROWLEY: Let me just test that
6 common area theory. One could imagine a situation
7 where a building has a tenants' lounge, common area
8 for the tenants' use, a sun deck, a roof terrace,
9 and then there are areas that are common in the
10 sense that they are open to the general public.
11 The lobby.

12 Do you say that because the building
13 provides a roof terrace for the use of the tenants
14 and intended only for the use of the tenants,
15 although not marked as such, there are, for
16 example, simply a set of doors that are unmarked,
17 as it suggests, that they are an entrance to the
18 roof terrace that the member of the public can come
19 into the general area, travel up the elevators, go
20 through a pair of closed, unmarked doors, and take
21 advantage of the tenants' roof terrace?

1694

1 MR. DUGAN: I think he would, if he stayed
2 within the common area the entire time.

3 Let's alter the hypothetical slightly.
4 Suppose it was a swimming pool that was next to an
5 apartment building, and that was readily accessible
6 from the parking lot of the apartment building.
7 And there was a fence around it, but there were
8 doors, gates. I would suggest that if there were
9 no signs saying, "Intended for tenants only, Please
10 keep out," then it would certainly not be a
11 trespass for someone to get out of their car, walk
12 through the gates, and walk into the swimming pool
13 area simply because it wasn't marked, because it's
14 an area that's open to the public, it's accessible
15 to the public the way the lobby is. In that
16 situation, unless there is a specific, to use the
17 phrase of the first case I showed you, "unless
18 there is a clear manifestation by the owner that he
19 intends for the general public to stay out of a
20 particular area in a generally public area, then
21 there is no trespass because in those

1695

1 circumstances, there is an implied consent in order
2 to enter that area without trespass."

3 ARBITRATOR REISMAN: Mr. Dugan, I would
4 like to go back to paragraph four on page four of

5 the abortion case that you've cited to us.

6 Isn't the ratio here in paragraph four
7 that the party entering is, quote, clothed with the
8 implied consent of the owner or possessor of the
9 property? I'm following Mr. Rowley's observation.
10 There surely is an implied consent to enter the
11 building on Birch Street, to go to any of the
12 offices, to go through the stairs or the elevator
13 or into the lobby, so that if one were in the
14 process of going through those to one of the
15 offices, there would be the implied consent of the
16 owner or possessor of the property.

17 But is it your submission that there was
18 implied consent of the owner or possessor of the
19 property to go into the area where the dumpster was
20 kept behind closed doors?

21 MR. DUGAN: Yes. Yes, it's our

1696

1 submi ssi on.

2 ARBITRATOR REISMAN: Then anyone from the
3 public could go in there.

4 MR. DUGAN: Anyone from the public could
5 go in there, just like anyone from the public could
6 walk through the doors into--or walk through, up
7 the stairs, or go into the elevator. It's in a
8 commercial building. There are a lot of doors to a
9 commercial building; and unless it's clearly
10 marked, unless there is a clear manifestation by
11 the owner for the public to keep out, then, yes,
12 there is an implied consent to go into any common

13 area.

14 PRESIDENT VEEDER: Mr. Dugan, can we just
15 pursue that because it's a critical part of your
16 argument. Go to the previous paragraph three, page
17 four of this St. Louis case. And if you look at
18 the circumstances in which an implied consent is
19 implied, it seems to be as follows--I'll just read
20 it. "When a business or public facility is
21 involved, and a portion thereof is open to the

1697

1 public, we believe that a person who enters an area
2 open to the public, at a reasonable time and in a
3 reasonable manner, has the implied consent of the
4 owner to enter the premises under a limited
5 privilege."

6 Now, is that relevant here as regards the
7 timing of the visits?

8 MR. DUGAN: It is, but if I could go to
9 the next case, I think I will show you a
10 distinction. What you're getting to is the purpose
11 of the fact that he was going there to retrieve
12 documents somehow undercut the privilege, undercut
13 the consent, and I don't think it does.

14 PRESIDENT VEEDER: What would be set
15 against you, no doubt, is that if this is a case of
16 implied consent, why these apparent subterfuges,
17 the membership of the health club, the 6:00 visits?

18 MR. DUGAN: Well, the 6:00 visits, he
19 stated, were simply because of Los Angeles has

20 notorious traffic. And, I mean, Mr. Dunne didn't
21 testify, but he went at a much different hour.

1698

1 And with respect to the health club, it
2 was more belt and suspenders, the idea that it was
3 an additional authority for being there and an
4 explanation for being there.

5 PRESIDENT VEEDER: But, Mr. Dugan, it
6 doesn't work as an additional authority if it's
7 implied consent.

8 MR. DUGAN: It was not necessary. We do
9 not believe it was necessary for him to be a member
10 of the health club. We think the fact that it was
11 getting to that, the fact that he was a member of
12 the health club makes him also an invitee onto the
13 grounds as well, and that is an additional reason
14 why there was no trespass here, but that's above
15 and beyond the fact we don't think he needed to be
16 a member of the health club. The fact that he was,
17 again, is an additional reason why it was not a
18 trespass.

19 But getting back to your point, what
20 you're driving at, I assume, is the idea that was
21 there an implied consent for someone to come in and

1699

1 go through the garbage and take the discarded
2 materials. If we go to this next case, which is

3 the Maricopa County case, and go to page two,
4 paragraph three, and all the way at the bottom,
5 there is a statement by the Court there, "For
6 example, the individual who enters a business
7 establishment with intent to commit grand or petty
8 theft and does so can be charged with burglary, but
9 not trespass for his entry upon the premises open
10 for business with the implied consent of the owner
11 that all the public is welcome in his business
12 establishment."

13 So, we do not think that the fact they
14 were coming in for the purpose of obtaining the
15 documents, were this not a common, publicly
16 accessible area, it might be something else, but we
17 don't think that it in any way undercuts the
18 implied consent by the landlord or the owners of
19 this property that any member of the public could
20 go through doors that are not marked with the sign
21 that says "No Trespassing."

1700

1 Now, just getting to that second point
2 about the fact that he was a member of the health
3 club, we believe that because he was a member of
4 the health club, he was an invitee, and he was an
5 invitee who was entitled to use all the common
6 areas open to invitees in general, including the
7 what we now--what the evidence shows is the
8 dumpster area, which was a common area open to the
9 tenants of the building and open to their invitees.

10 So, we think that for both of those

11 reasons that there was no trespass here, and that
12 what the investigators did was consistent with the
13 common law, and whether it was statute or common
14 law, that there was an employed consent for them to
15 go in. And the fact that they did it so long
16 without no one questioning them, they did it in
17 broad daylight. They made no attempt to cover up
18 what they were doing I think further corroborates
19 the fact that that--

20 PRESIDENT VEEDER: Was it broad daylight?
21 Surely in winter it might be in darkness.

1701

1 MR. DUGAN: Well, perhaps not in winter.
2 You're right, in winter it might have been in
3 darkness, but certainly during the summer it was in
4 broad daylight. Certainly when he took the
5 pictures it was in broad daylight, and no one
6 stopped him or questioned him. And there was no
7 sign. There was no sign that said "No
8 Trespassing," which is the traditional way that a
9 business owner ensures that trespasses are not
10 committed on parts of the property that are
11 otherwise open to the public.

12 Now, those are the reasons why we believe
13 that what took place was perfectly legal. Even if
14 the Tribunal were to conclude that there was a
15 trespass, or that there was a violation of the Brea
16 city ordinance, which I went over before, we still
17 do not believe that the evidence should be

18 excluded. The rule in most courts--in a number of
19 courts in the United States, in civil actions, is
20 that there is no exclusionary rule. Many of the
21 cases that we have gone over in the past week or so

1702

1 deal with Fourth Amendment cases, constitutional
2 cases, where evidence that has been seized
3 illegally is excluded. The exclusionary rule.
4 That rule does not, in many instances, perhaps most
5 instances, operate with respect to civil actions.
6 With respect to civil actions, if the evidence is
7 probative and competent, the fact that it may have
8 been obtained illegally is irrelevant.

9 And we believe that that should be the
10 standard here for two reasons. I will get to that
11 in a second, but first if I could do that--well,
12 let me give you the three cases that I think stand
13 for this proposition. The first is the Superior
14 Court of Connecticut. It's Xiukun Lin versus
15 National Railroad Passenger Corporation. The
16 second is Pullin versus Louisiana State Racing
17 Commission. And the third is Sheetz versus the
18 Mayor and City Council of Baltimore.

19 And in the first case, the plaintiff was a
20 passenger who was injured on a railroad. The
21 plaintiff's lawyer's agent went onto the

1703

1 right-of-way of the railroad and videotaped a
2 certain portion of the railroad. The railroad
3 moved to suppress the evidence on the grounds that
4 it was the fruit of a trespass, and the Court there
5 didn't get to the question of question of trespass
6 because if it decided that even it were a trespass,
7 it was still going to take the evidence in because
8 there was no prejudice to the railroad. And I
9 think that stands for the proposition, the general
10 proposition, certainly as a matter of lex arbitrii,
11 that if the truth-telling function of the evidence
12 is more important than the alleged violation, and
13 where there is no significant prejudice to the
14 party against whom the evidence is being used, then
15 there is no reason to exclude the evidence. Now--

16 ARBITRATOR REISMAN: Are you finished with
17 the Lin case?

18 MR. DUGAN: I am finished with the Lin
19 case.

20 ARBITRATOR REISMAN: Did this case go on
21 to appeal? This is a very low court in New Haven.

1704

1 MR. DUGAN: I don't know the answer to
2 that, I'm sorry.

3 Now, if I could just take the Tribunal
4 through just three levels of what--three examples
5 of what the evidence we would like to get from
6 Mr. Vind so you can see the--why we believe it's
7 important to our case. One of the Vind documents,
8 document 29, is a document dated to July 8, 1997.

9 It's to Marty Andreas from Dick Vind, subject:
10 California situation. And if you recall in 1997
11 was before the UC-Davis study was finished.

12 And this document references two things:
13 It references Vind's knowledge of the hearing that
14 senator mount joy would have on the MTBE bill. The
15 amendments that are referred to as our amendments
16 with respect to MTBE labeling and lifting the
17 oxygen cap--

18 PRESIDENT VEEDER: Mr. Dugan, we're
19 looking at Tab 29?

20 MR. DUGAN: I'm sorry, Tab 29 of the--

21 PRESIDENT VEEDER: Of 226?

1705

1 MR. DUGAN: Exhibit 226, that's correct.

2 A memo dated July 8, 1997.

3 And the third paragraph in the body of the
4 text talks about the legislative efforts of both
5 Vind, and he's certainly making Marty Andreas aware
6 of it, and--

7 PRESIDENT VEEDER: Just slow down because
8 I'm looking for the passage, and I don't see the
9 one you're referring to.

10 MR. DUGAN: I'm sorry.

11 Okay. If you look at the third paragraph,
12 I will read the whole paragraph into the record.

13 PRESIDENT VEEDER: Yes.

14 MR. DUGAN: "For your information, the
15 assembly hearing on the Mountjoy MTBE bill will be

16 next Tuesday, July 15th. At that time we are
17 hopeful that our two amendments, MTBE labeling and
18 lifting of the oxygen cap, will be adopted.

19 Next paragraph, "We are working closely
20 with California rice growers who see ethanol
21 production from rice straw as viable alternative to

1706

1 rice straw burning, which is being phased out. "

2 So, again, this is 1997. This is evidence
3 that we believe supports one of the key issues in
4 our case, that it was, indeed, Regent International
5 and ADM who were out doing their best to stir up as
6 much--stir up public opinion, stir up support for a
7 ban of MTBE, that this didn't happen because of
8 legitimate fears. It happened because Vind and ADM
9 were doing everything they possibly could to get
10 MTBE banned.

11 Similarly, we showed you the telephone
12 slips. There were three calls, at least three,
13 possibly four calls from Governor Davis's office
14 during a 15-month period in what appears to be
15 1997--1996 through 1998.

16 Now, those are just the messages that were
17 written down. If you assume that there were many
18 times when Governor Davis called, where there was
19 no message written, if you assume that Mr. Vind
20 called Governor Davis himself, we think that these
21 will show that the relationship between Mr. Vind

1 and Governor Davis was much wider and deeper than
2 Mr. Vind let on during his cross-examination, that
3 Mr. Vind, I think, led the Tribunal to believe
4 there was very little in the way of telephone
5 contact, and we think that's false.

6 PRESIDENT VEEDER: Mr. Dugan, on this
7 aspect can you just take us through the particular
8 phone messages you say are important to your case.

9 MR. DUGAN: Certainly. There are three of
10 them here, and I think there is one that is missing
11 from this. If you turn to--

12 PRESIDENT VEEDER: Could I help you. The
13 second page, there is a reference to a message from
14 Gray Davis's office.

15 MR. DUGAN: Yes. Julie, Gray Davis's
16 office--

17 PRESIDENT VEEDER: Is that important?

18 MR. DUGAN: Yes, that is important. If
19 you go down to the bottom, meeting with Dwayne, et
20 cetera, status. We'd like to know if it's a
21 reference to Dwayne Andreas.

1 PRESIDENT VEEDER: Let's move on. What
2 other one do you think it important?

3 MR. DUGAN: I think two pages after that,
4 Rebecca, Gray Davis's office, call at 9 a.m.
5 The next page, Rebecca--

6 PRESIDENT VEEDER: Just slow down. I've

7 lost that.

8 MR. DUGAN: I'm sorry.

9 (Pause.)

10 ARBITRATOR REISMAN: Mr. Dugan, if you
11 could just refresh me, I see month and day, but I
12 don't see year. What is the year of these calls?

13 MR. DUGAN: The year of the calls we have
14 deduced--there is no direct evidence, but we have
15 deduced that it is--hold on for just a second so
16 I'm accurate.

17 (Pause.)

18 MR. DUGAN: It's 1996, and it goes through
19 1998. And the reason why we have deduced that is
20 because one of the messages here talks about
21 April 15th, and it gives a specific date for it.

1709

1 The specific day of the week for it, that's the
2 first thing. The second thing is, we checked this
3 against a calendar to see what Saturdays and
4 Sundays; there were no messages, and that
5 corroborates with it as well.

6 Now--

7 ARBITRATOR REISMAN: Excuse me, but you're
8 saying 1996 to 1998?

9 MR. DUGAN: That's correct.

10 ARBITRATOR REISMAN: So, these were all
11 the calls that came into the Vind office for that
12 period?

13 MR. DUGAN: This was a 15-month period,

14 right, and these were four messages that were
15 taken, written down with respect to--these were
16 just the message slips, remember? And our position
17 is that if there were four message slips--

18 (Pause.)

19 MR. DUGAN: I believe Mr. Vind also
20 testified that they ran a number of these different
21 books at any one time, that this was not the only

1710

1 one, so this is not the sole record of all the
2 messages that were taken during that period. It is
3 a record of the messages that were taken during
4 that period.

5 And our position is that these four--four
6 phone slips showing at least four phone calls from
7 Governor Davis's office during this period can be
8 multiplied because if there were four messages
9 during this period and one phone message book,
10 there were undoubtedly many, many other phone
11 calls.

12 Plus, there are a lot of messages from
13 ADM, ADM executives.

14 PRESIDENT VEEDER: Let's just go through
15 them because we want to see exactly what you need
16 and what you say you may not need.

17 So far, we've got two. The second one
18 from Davis's office for Dick, Rebecca. We've got
19 that one. That's the second one. Where's the
20 third?

21 MR. DUGAN: Next page.

1711

1 PRESIDENT VEEDER: Where is the next one?

2 MR. DUGAN: Top one, Dick, Rebecca, and
3 then it has Gray Davis.

4 PRESIDENT VEEDER: And is the fourth the
5 following page?

6 MR. DUGAN: Following page, Lauren, Gray
7 Davis, donation, office.

8 PRESIDENT VEEDER: Over the page you
9 referred us earlier during these proceedings to the
10 note for Doug, Steve Hamilton. Is that something
11 you need?

12 MR. DUGAN: Yes. It says "re: Methanex."

13 PRESIDENT VEEDER: Do you know who
14 Mr. Hamilton is?

15 MR. DUGAN: No, I don't.

16 PRESIDENT VEEDER: Do you want this one?

17 MR. DUGAN: Yes, we did. That is one of
18 the ones we would want.

19 PRESIDENT VEEDER: Over the page at the
20 top, do you want that one?

21 MR. DUGAN: Senator Bob Kerry, yes, we

1712

1 would want that one, too.

2 PRESIDENT VEEDER: Then over the page
3 you've got Mr. Listenberger, message--

4 MR. DUGAN: We want that one as well.

5 PRESIDENT VEEDER: Mr. Listenberger, two
6 pages further on, second one down as well?

7 MR. DUGAN: Yes, yes.

8 Eric Vaughan, as well as that one, he's
9 head of the Renewable Fuels Association.

10 PRESIDENT VEEDER: There is another Gray
11 Davis one at bottom of the following page.

12 MR. DUGAN: Right.

13 PRESIDENT VEEDER: That one as well?

14 MR. DUGAN: That one as well.

15 And two above the one from Governor Gray
16 Davis is Lockyer's office. On the next page is
17 Susan Torricelli.

18 PRESIDENT VEEDER: Who is she?

19 MR. DUGAN: She was the wife of
20 then-Senator Torricelli.

21 PRESIDENT VEEDER: And the last page,

1713

1 anything?

2 MR. DUGAN: There is one about a political
3 contribution, "Did we ever donate to Hal Benson in
4 a political contribution way?" Top of the page.

5 PRESIDENT VEEDER: What is that opinion?
6 Can you tell us?

7 MR. DUGAN: We don't know.

8 PRESIDENT VEEDER: We have gone through
9 some you say you need. The others--

10 MR. DUGAN: The others, I actually--we
11 offered to redact them, and we do have redacted

12 copies of this.

13 PRESIDENT VEEDER: So just going through
14 that list again, we've got nothing on the first
15 page.

16 MR. DUGAN: No, I think on the first page
17 what we wanted to get out was the reference to Rod
18 Summerfield at CARB, California Air Resources
19 Board.

20 PRESIDENT VEEDER: You would like that?

21 MR. DUGAN: Yes, we would like that.

1714

1 PRESIDENT VEEDER: So, that's one on the
2 first page.

3 We got one on the second page.

4 MR. DUGAN: Yes.

5 PRESIDENT VEEDER: Dick, Julie, Gray
6 Davis.

7 MR. DUGAN: Yes.

8 PRESIDENT VEEDER: You've got nothing on
9 the third page; correct? It has sort of asterisk
10 magnified in the second message, if we are looking
11 at the same page.

12 MR. DUGAN: That's right. None on that
13 page.

14 PRESIDENT VEEDER: Nothing on that page.

15 The next page, second one down you want
16 Dick, Rebecca, Gray Davis?

17 MR. DUGAN: Correct.

18 PRESIDENT VEEDER: Then the following page
19 at the top, you want Rebecca, Gray Davis?

20 MR. DUGAN: Correct.

21 PRESIDENT VEEDER: Following page, second

1715

1 one down, you want Rebecca, Lawrence, Gray Davis's
2 office?

3 MR. DUGAN: Correct.

4 And Bob Hertzberg as well.

5 PRESIDENT VEEDER: Who is he?

6 MR. DUGAN: He was a politician in
7 California. There was a Bob Hertzberg who was a
8 politician in California.

9 PRESIDENT VEEDER: Over the page, we have
10 Steve Hamilton, re Methanex. That one?

11 MR. DUGAN: That's correct.

12 PRESIDENT VEEDER: Then over the page we
13 have got a--

14 MR. DUGAN: Senator Kerry.

15 PRESIDENT VEEDER: --Senator. And then
16 following page, third one down, Roger Listenberger.

17 MR. DUGAN: Correct.

18 PRESIDENT VEEDER: Next page, nothing?

19 MR. DUGAN: Next page, nothing.

20 PRESIDENT VEEDER: Page after that, you've
21 got Roger Listenberger, second one down, and Eric,

1716

1 third one down.

2 MR. DUGAN: That's right.

3 PRESIDENT VEEDER: Next page, second one
4 down, you've got Deborah and the last one, fourth
5 one down, Gray Davis again.

6 MR. DUGAN: Correct.

7 PRESIDENT VEEDER: Next page, second one
8 down you've got Susan Torricelli ***.

9 MR. DUGAN: Correct.

10 PRESIDENT VEEDER: Next page at the top,
11 Hal Ben--is it Hal Benson?

12 MR. DUGAN: Hal Bernson, I believe.
13 That's what it looks like.

14 PRESIDENT VEEDER: Apart from those,
15 you're not pursuing the other messages?

16 MR. DUGAN: No.

17 Now, the last example I would like to show
18 you of the types of things we would like to pursue
19 is Tab 5 of the Vind documents, which is at--Tab 5
20 is Exhibit 56. It's a letter dated March 19th,
21 1998, from Regent International to Erin Brokovich

1717

1 and the law firm of Masry and Viditoe, and it talks
2 about the mutual interest in essence in filing suit
3 against MIBE.

4 And again, we wanted to question him about
5 this because we believe this is part of a pattern
6 of certainly Regent, possibly ADM as well, to stir
7 up lawsuits against MIBE. To stir the pot. And
8 that's part of our case, that this ban didn't
9 happen out of thin air. This ban was precipitated

10 by the proactive lobbying and actions like this by
11 Vind and by ADM

12 So, those are just three examples of what
13 we would like to accomplish by talking to Mr. Vind.

14 PRESIDENT VEEDER: Could we take it
15 further than the examples. We would like you to
16 look at Tab 24, and just take us through as to why
17 you say they are relevant and necessary to your
18 cross-examination of Mr. Vind or otherwise for your
19 case.

20 MR. DUGAN: Well, I mean, what this does
21 is it links both Vind and ADM to the lobbyists in

1718

1 California, Lynn Suter, and to the attempts to try
2 to again what we were just saying, stir up, agitate
3 public opinion in order to--

4 PRESIDENT VEEDER: Let's move to Tab 25.
5 What does that show?

6 MR. DUGAN: Again, this is--it shows they
7 were pursuing litigation against MTBE, on
8 November 14th, 2000, it's from Vind, talking about
9 Joe Gonzales, he's been assisting Joe as he pursues
10 litigation against producers of a toxic chemical,
11 MTBE.

12 PRESIDENT VEEDER: Tab 26.

13 MR. DUGAN: Tab 26, again is just more
14 evidence of Richard Vind doing what he can,
15 lobbying Gray Davis, just the whole general
16 lobbying process, and you will note that the
17 California Farm Bureau is there, the Rice Board is

18 there, the Rice Growers are there. Part of the
19 whole ethanol lobby.

20 PRESIDENT VEEDER: We will stop you.

21 We've got it.

1719

1 Tab 27.

2 MR. DUGAN: Tab 27 is January 6, 1997.

3 It's Lynn Suter, who was Vind's lobbyist, and this
4 is the one that we quoted in both--some of our
5 pleadings and in the opening statement. This is
6 what we called the lovefest document, you could see
7 in the second paragraph. It's the lovefest between
8 the Legislature, and this is the one that details
9 all the witnesses that Vind's agent has contacted
10 and procured, and it's his effort to agitate public
11 opinion against MTBE.

12 Tab 28 is the same type of thing. It
13 describes the legislative efforts of Lynn Suter to
14 put together a coalition and to stir up agitation
15 against MTBE.

16 PRESIDENT VEEDER: 29?

17 MR. DUGAN: 29 we have gone over already.

18 PRESIDENT VEEDER: Sorry.

19 And 30, let's go through the address book.

20 What--

21 MR. DUGAN: Well, the main thing we wanted

1720

1 to use the address book was to show who's on it.
2 The Andreases are on it.

3 PRESIDENT VEEDER: Let's just go through
4 it. So, under A, you have ADM, you've got Dwayne
5 Andrea, Allen Andreas, Marty Andreas.

6 MR. DUGAN: All the Andreases.

7 PRESIDENT VEEDER: Anybody else under A?

8 MR. DUGAN: No, no one else under A.

9 Continuing on there, Barbara Boxer,
10 Senator Barbara Boxer. John Burton on the next
11 page.

12 One of the things as we go through this,
13 there are very few home phone numbers here, and you
14 get to Gray Dais, and there is a home phone number
15 there, which we believe is evidence of an
16 extraordinary close relationship between Vind and
17 Gray Davis.

18 PRESIDENT VEEDER: Please take us through
19 each entry.

20 Anything else?

21 MR. DUGAN: Dick Gephardt under G, on the

1721

1 next page.

2 Under H, Ed Hargehausen, who is the
3 President of ADM

4 Bob Herzberg, who is the assemblyman who
5 we just referred to, Winston Hickox, which is the
6 Secretary of CalEPA, which itself is pretty
7 extraordinary. Vind is on telephone terms with the

8 Secretary of CalEPA.
9 Nothing else from that page.
10 Next page, Bob Kerry, Senator Kerry.
11 Bill Lockyer, the next column, the
12 Attorney General, and again there is a home phone
13 number for Bill Lockyer.
14 Renewable Fuels Association under the Rs.
15 Brad Sherman, Congressman.
16 Lynn Suter, Rebecca Suter, who is under
17 the Governor Gray Davis Committee.
18 Senator Torricelli.
19 Dan Weinstein.
20 And that's it.
21 And we believe these documents are

1722

1 material, probative, and authentic, and the
2 Tribunal's consideration of them will assist the
3 Tribunal in finding out the truth with respect to
4 the facts that are alleged in this complaint. We
5 don't believe that there is any countervailing
6 reason to exclude them, even if the Tribunal were
7 to conclude that they were illegal.

8 One of the things I didn't have a chance
9 to go through is, in a number of cases, courts that
10 have confronted the fact that a defendant's trash
11 was seized illegally in the sense that it was a
12 trespass, having ignored the trespass because it's
13 so minor a violation. And we think that even if
14 the Tribunal were to conclude that there were a
15 trespass here, even though those dumpsters were, in

16 effect, at curbside, that it is not so significant
17 a violation that it would outweigh the probative
18 evidence that's been presented to the Tribunal.

19 ARBITRATOR REISMAN: The Lin case is
20 certainly--certainly makes the point that you've
21 just expressed. You say there were a number of

1723

1 cases. Can you draw attention to other cases that
2 support the holding in Lynn?

3 MR. DUGAN: Behind that we gave you the
4 *** Pullin case versus the Louisiana State Racing
5 Commission, and the Sheets case versus the Mayor
6 and City Council of Baltimore.

7 PRESIDENT VEEDER: Since we haven't had a
8 chance to read them, can you just draw our
9 attention to the section.

10 MR. DUGAN: I knew you were going to ask
11 me that.

12 In the Pullin case, I think the citation
13 is to 106.

14 I think if you go to page four, the
15 conclusion is there in the left-hand column, the
16 second paragraph, headnote beginning number two:
17 In sum, we find that the high social cost would
18 likely result from exclusion. We find that high
19 social cost would likely result from exclusion of
20 challenged evidence. Moreover, we find that the
21 additional deterrent by you of applying the

1 exclusionary rule in this case would likely be
2 small. Therefore, we conclude that the likely
3 costs outweigh the likely benefits. Accordingly,
4 we hold that the exclusionary rule does not apply
5 in civil proceedings before the Louisiana State
6 Racing Commission. The Commission properly
7 considered the illegally seized evidence in its
8 civil proceeding against Vernon Pullin.

9 ARBITRATOR ROWLEY: Could you just help me
10 on this. If for the purposes of our discussion now
11 we both assume that the evidence was obtained
12 through a trespass, the commission of a trespass,
13 if this Tribunal were to admit that evidence, we
14 would have to balance, would we not, the social
15 cost involved in condoning trespass to obtain
16 evidence for NAFTA Chapter 11 proceedings?

17 MR. DUGAN: I don't think that the
18 conclusion that could reasonably be drawn from a
19 decision to admit the evidence is a condoning of
20 trespass. And just for the record, naturally, we
21 don't believe there was a trespass, and the

1 Tribunal need not even reach the question of
2 whether there was a trespass because it can proceed
3 on the same basis as the Connecticut court did and
4 not get to the question and can simply conclude
5 that even if there had been a trespass, that would

6 not be a sufficient reason not to admit the
7 evidence.

8 But in any case, if it were to admit the
9 evidence on the basis of an established trespass, I
10 don't think that the conclusion to be drawn from
11 that is that it's condoning. It's simply a
12 statement that in the particular circumstances of
13 this case, the probative value of the evidence that
14 has been proffered outweighs any minor social cost
15 of a minor trespass such as this.

16 ARBITRATOR REISMAN: Mr. Dugan, I
17 understand now the Racing Commission case you just
18 brought our attention to, *** Pullin, but in effect
19 the only case that we have on the civil side is the
20 Lin case that's directly on point; am I correct?

21 MR. DUGAN: I think that's right. I think

1726

1 the third case I gave you was Sheetz versus the
2 Mayor and City Council of Baltimore, and that
3 certainly is civil.

4 ARBITRATOR REISMAN: It is?

5 MR. DUGAN: It's civil in the sense that
6 it's not criminal. It was Former Correctional
7 Officer Petition for a Writ of Mandamus to
8 Challenge Termination of Employment in Reliance on
9 Illegally Seized Evidence. And in that case--and
10 this is usual because it focuses on another
11 factor--the Court concluded, and I'm looking at
12 page three, the second full paragraph, "Emphasizing
13 that there was no evidence that the officers were

14 aware of the defendant's probationary status and
15 that probable cause was a close call, we found that
16 the warrantless search of the probationer was
17 objectively reasonable. Given the lack of proof of
18 bad faith, the evidence was admissible in the
19 probation revocation hearing.

20 I'm sorry, that's not the holding. I was
21 quoting what I think was the--they were quoting

1727

1 from the exclusionary rule, and it was not--I think
2 you have to go all the way to page five to find the
3 holding in this case.

4 And in that paragraph it states--

5 ARBITRATOR ROWLEY: Which paragraph?

6 MR. DUGAN: It's the paragraph beginning
7 with the headnote with the number 217. It states,
8 "We note that the hearing officer below, in his
9 thorough review of the case touched on many of
10 these issues. However, he seemed to conclude that
11 illegally obtained evidence is always admissible in
12 civil discharge proceedings. Because such evidence
13 were properly challenged as inadmissible upon a
14 finding of bad faith, we must remand for a new
15 hearing in accordance with this opinion."

16 So, one of the elements that this Tribunal
17 focused upon was bad faith in the part--on the part
18 of the party proffering the witness or proffering
19 the evidence, and I think in this case the record
20 has been established that there was no such bad

21 faith.

1728

1 ARBITRATOR REISMAN: I notice in the
2 Sheetz case that the Court discusses a Supreme
3 Court holding from 1965, which says that the
4 Supreme Court has extended the rule, that is the
5 exclusionary rule, to at least one civil
6 proceeding. I'm reading at page three.

7 You haven't submitted that case to us?

8 MR. DUGAN: I haven't submitted that case,
9 no, and I wasn't aware of it.

10 And again, I don't think I represented, I
11 certainly didn't argue that this is constant
12 throughout the country. I don't know that to be
13 the fact, and that's why I didn't argue it.

14 I have nothing more to add. For all those
15 reasons, we believe the evidence should be
16 admissible for use in cross-examination.

17 PRESIDENT VEEDER: We're coming to you,
18 Mr. Legum, but we just need to talk amongst
19 ourselves for a few minutes so please stay here,
20 and we will come back.

21 (Brief recess.)

1729

1 PRESIDENT VEEDER: Let's resume.

2 Mr. Legum, the Tribunal does not require
3 you to address us any further in regard to the

4 United States' s challenge to the admissibility of
5 Exhibits 52 through 60, 64, 66, 151, 153, 155, 159,
6 160 and 165, which correspond to Tabs 1 through 9,
7 11 to 13, 15 to 16, 18, to 19, and 21, which for
8 convenience I' d call them the Mr. Dunne
9 documentation.

10 We do invite to you address us on the
11 U. S. ' s challenge to the remaining exhibits in
12 dispute: That' s Exhibits 217 to 219, 222 to 223,
13 226, 258, and 259, which correspond to Tab Numbers
14 24, 25, 26, 27, 28, 29, 30, and 31.

15 Now, subject to that, we have a potential
16 logistical difficulty. It' s now 10 to one. At the
17 moment, conditionally, we have Mr. Vind scheduled
18 to give evidence by telephone at 2:00. We
19 understand he has to complete that testimony by
20 3:30. So, the first question we are going to ask
21 you is, how long do you need to address us?

1730

1 MR. LEGUM: One moment, please.

2 (Pause.)

3 MR. LEGUM: About a half an hour.

4 PRESIDENT VEEDER: Then proceed.

5 MR. LEGUM: Thank you, Mr. President.

6 I would like to begin with a couple of
7 general observations. First, on the subject of
8 United States' s motion to exclude evidence,
9 Methanex' s representations of fact to this
10 Tribunal, whether presented through counsel or
11 through sworn testimony of witnesses, have seemed

12 to have a half-life of about 24 hours. It is
13 tempting to go through the many inconsistencies
14 between what the Tribunal was told on one day and
15 what the evidence proved to be on another day and
16 what, in fact, the position was the day after that,
17 but I'm going to refrain from doing that.

18 The second point is that it is the burden
19 of the proponent of evidence to establish its
20 admissibility, and Methanex has not come close to
21 doing that here.

1731

1 I'm not going to address the facts with
2 respect to Mr. Dunne or Mr. Puglisi.

3 The testimony we heard from Mr. McAnish
4 conflicts with that of Ms. Morisset in several
5 important respects. First, Ms. Morisset testified,
6 and I'm referring to the transcript at page 686,
7 lines 13 through 16. She testified that, quote,
8 The documents were obtained from a public place,
9 and we did not want the investigator to trespass
10 onto any private property to obtain those
11 documents, closed quote.

12 Mr. McAnish testified this morning that
13 the documents, in fact, were taken from inside a
14 private building.

15 So, it seems that whatever information the
16 law firm had concerning the circumstances of the
17 collection of these documents was not in accord
18 with that that Mr. McAnish presented.

19 Second point, on the subject of the legal
20 opinion that Mr. McAnish relied upon as
21 establishing the legality of the documents, I would

1732

1 refer the Tribunal to page 713 of the transcript.
2 The answer is a bit long here, but I asked
3 Ms. Morisset about the conversation concerning the
4 legality of what Mr. Stirwalt was doing, and
5 Ms. Morisset then related a conversation she had
6 with one of the partners and then noted, quote, And
7 later on, he showed me an excerpt from the
8 California code, saying that it was legal, closed
9 quote.

10 Then I went on to ask, "Is it your
11 understanding that he did research on that subject
12 after you raised it with him?"

13 "ANSWER: I don't believe he--that he
14 did the research. I believe the excerpt
15 from the California Code came from the
16 investigator."

17 So, Ms. Morisset testified last week that
18 it was the investigator that provided the provision
19 of the California Code, which we have still not
20 seen to this date, that demonstrated that the
21 collection of documents in this fashion was legal.

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1 Mr. McAnish and Mr. Stirwalt testified

2 this morning that, in fact, it was the law firm
3 that provided the opinion that the collection of
4 documents was legal. The testimony of Mr. McAnish
5 this morning demonstrated that the documents were
6 unequivocally collected from inside a private
7 building, in a nonpublic area, an area that was
8 common to the tenants of the building, but not to
9 the public. There was no business for members of
10 the public to conduct there.

11 His testimony also established beyond a
12 doubt that the collection of documents was in
13 violation of local law, local law in the form of
14 City of Brea Code provision that the Tribunal has
15 been referred to before.

16 Finally, Mr. McAnish's testimony
17 demonstrated that he was well aware that he really
18 shouldn't have been doing what he was doing at the
19 time. The selection of early morning hours for his
20 visits, the membership in the gym which he admitted
21 was a cover in the event that someone asked him

1734

1 what he was doing there, both of those facts point
2 to the fact that Mr. McAnish wasn't in that trash
3 area on an invitation of any tenant of the
4 building, whether express or implicit.

5 I think I will stop there, given the
6 Tribunal's deadline, and turn it over to
7 Ms. Menaker to address the law.

8 MS. MENAKER: Thank you. As Mr. Legum
9 commented, I will address the legal analysis.

10 It's been somewhat difficult for us to get
11 a full understanding of Methanex's argument that
12 this activity was, in fact, legal, because over
13 time, the standard that they seemed to have
14 suggested has changed somewhat. We heard yesterday
15 they argued that accessibility was the key to
16 legality. At another time they argued that once
17 Mr. Vind had disposed of the documents in his own
18 trash bin in his office and that the cleaning
19 people later came to take that, he had abandoned
20 those documents at that time. I believe, then,
21 that line of argument was later retracted.

1735

1 And today, Methanex seems to argue that
2 the key is really whether or not there is a "No
3 Trespassing" sign.

4 Now, for the following reasons, we don't
5 think that any of those standards are the key to
6 determining whether or not this activity was legal,
7 and we believe that the evidence gathered in this
8 fashion was, indeed, illegally obtained. So, I
9 want to set forth the following analysis.

10 First, I want to discuss the Brea
11 ordinance which I already distributed and explain
12 why the conduct at issue was, indeed, violative of
13 that city ordinance.

14 I then want to address the argument that
15 Methanex made that the ordinance is somehow
16 invalid. And I will show that the ordinance,

17 contrary to Methanex's suggestion is, indeed, valid
18 and enforceable under California law.

19 The United States submits that that should
20 be the end of the analysis, that at that point we
21 have established that the documents were obtained

1736

1 in a manner that is inconsistent with the governing
2 law. However, I know that the Tribunal has
3 expressed an interest in various other aspects of
4 the law, and Methanex has made arguments referring
5 to those cases, so what I will next do is I will
6 turn to the law of trespass in California and show
7 that this activity was, in fact, a trespass under
8 California law.

9 I will then show that under California
10 law, Mr. Vind would not be deemed to have abandoned
11 the documents that he put in the trash.

12 And finally, I will discuss in the context
13 of the Fourth Amendment jurisprudence that Methanex
14 has relied so heavily on, I will show that Mr. Vind
15 did, even if that jurisprudence was applied, that
16 under California law Mr. Vind would be deemed to
17 have retained a reasonable expectation of privacy
18 in the documents that were allegedly taken from the
19 dumpster.

20 So to begin first with the Brea ordinance,
21 that ordinance provides, and I'll quote from the

1737

1 ordinance since this is important, quote, No person
2 other than the owner thereof, the owner's agents or
3 employees, or an officer or employee of the city or
4 a permittee's agents or employees authorized for
5 such purposes shall tamper or meddle with any solid
6 waste, green waste, or recyclable material or
7 receptacle or the contents thereof, or remove the
8 contents thereof, or remove any receptacle from the
9 location where the same shall have been placed for
10 a collection. "

11 Now, it is uncontested that Mr. McAnish
12 did, indeed, remove the contents from the dumpster.
13 It is also uncontested that he was not the owner of
14 the trash, nor was he authorized by the owner of
15 the trash to take those contents, nor was he a city
16 employee or an officer of the city.

17 Under the Brea ordinance, it doesn't
18 matter where the dumpster was located. It is
19 legally irrelevant whether the dumpster was located
20 inside the building or whether it was outside the
21 building.

1738

1 PRESIDENT VEEDER: Is that right? Because
2 you just read paragraph three. It has to be placed
3 at a place where it's being placed for collection.

4 MS. MENAKER: I believe, and I do recall
5 your asking that question, and being somewhat
6 confused at the time, and I've looked at the
7 language.

8 PRESIDENT VEEDER: I may be confused all
9 the time.

10 MS. MENAKER: No, no I meant I was
11 somewhat confused. But looking at the language, I
12 believe--I believe that that phrase refers to the
13 removal of the actual bin, removal of the actual
14 dumpster. If you read it, and taking out some of
15 the clauses just so it's shorter without changing
16 the meaning, the clause essentially says no person
17 shall tamper or meddle with any solid waste or
18 remove the contents thereof, since one of the
19 things they can't do is remove the contents from
20 the trash.

21 Secondly, they can't remove any

1739

1 receptacle, the dumpster, from the location where
2 that dumpster has been placed for collection, so
3 there are a number of things you can't do. You
4 can't take the trash--

5 PRESIDENT VEEDER: I can see all that.
6 I'm looking at the opening phrase or paragraphs
7 8.28.120, Placement of Receptacles for Collection.
8 And the first paragraph refers to the duty of every
9 person having charge or control of any dot, dot,
10 dot, commercial premises to set out or place
11 receptacles for the collection of refuse,
12 et cetera, as follows, and then you go to the
13 second paragraph, and the primary rule is any
14 receptacle is to be placed at the curb in front of

15 the dwelling, which suggests that when it's still
16 inside the building on private property, it hasn't
17 been placed there for collection. Something else
18 has to happen to it.

19 MS. MENAKER: I respectfully disagree with
20 that reading because if you read through the
21 paragraph, it then goes on to say that it shall be

1740

1 placed for collection in these places or at some
2 other location when such placement will expedite
3 collection as approved by the City Manager.

4 Now, we know the manner in which this
5 dumpster, the trash was collected for removal was
6 that the dumpster would move up, would open the
7 doors, would take the dumpster out, throw the trash
8 into the garbage truck and then put it back. So
9 that--

10 PRESIDENT VEEDER: Take it more slowly.
11 That's the proviso at end of the paragraph.

12 MS. MENAKER: Yes.

13 PRESIDENT VEEDER: But that proviso
14 requires a designation by the permittee and
15 approval by the City Manager. Do we have any
16 evidence of that?

17 MS. MENAKER: We don't have--I have not
18 looked to see if this location was explicitly
19 approved by the City Manager for collection, but I
20 think from the evidence we can draw the inference
21 that, indeed, it was, because the garbage truck,

1741

1 that is where it came on a weekly basis to pick up
2 the trash, and there is no evidence that that was
3 impermissible, an impermissible placement for the
4 trash receptacle, and the place where the dumpster
5 was located is the place from where the trash was
6 collected.

7 So, I think that is one and the same. And
8 in any event, I think reading that paragraph D,
9 again, it doesn't refer in that paragraph to the
10 place of collection insofar as removal of the
11 contents of the trash is concerned.

12 So, it is--for these reasons it is our
13 submission that the activity in question, on its
14 face, violated the Brea city ordinance.

15 Now, the only arguments that we've heard
16 as to--to support the contention that somehow this
17 was not illegal, I think, can be easily dismissed.
18 The first was--I believe Methanex made an argument
19 that Mr. McAnish, to the extent his activities were
20 illegal, he was unaware of that, and in good faith
21 he believed that he was operating in a legal

1742

1 manner.

2 Now, as far as we're aware, that is never
3 a defense to a violation of a law. The fact you
4 may not understand that you are breaking the law
5 does not make your activity legal in any sense, so

6 I don't think that that at all can impact the
7 construction of the Brea city ordinance.

8 Second, yesterday at one point Methanex
9 argued that perhaps the ordinance wasn't violated
10 because the purpose of the ordinance was really
11 sanitation, and its purpose was not to criminalize
12 or prohibit people from going in and removing
13 things from the trash. And again, Methanex has
14 provided no authority for the proposition that it's
15 a defense to a violation of the law, that the
16 manner in which the law was violated was not part
17 of the problem that the legislator--that the
18 Legislature sought to address when promulgating the
19 law.

20 And in any event, the policy as set forth
21 in the preambular language to the ordinance itself

1743

1 expresses a purpose that is much broader than
2 merely controlling sanitation issues. If you look
3 at Section 8.28.10 of paragraphs A and B that are
4 labeled "Legislative Policy," it sets forth in A
5 that the policies behind this ordinance include
6 public nuisance, illegal dumping, and other
7 problems affecting the health, welfare, and safety
8 of its residents.

9 So, indeed, the policy behind enactment of
10 this statute was broader than merely regulating
11 sanitation. Its purpose was broader in that it was
12 meant to prohibit illegal dumping, and they have

13 this express provision prohibiting persons from
14 removing things from trash, as well.

15 And finally on this point, I would like to
16 direct the Tribunal's attention to a case that we
17 provided on Sunday evening. It's Washington versus
18 Boland. This is a 1998 case from the Supreme Court
19 of Washington, and in this case the Court expressly
20 rejected the argument that Methanex is making here.
21 I'm going to quote from some language that is at

1744

1 page star 1115.

2 PRESIDENT VEEDER: Ms. Menaker, are these
3 the cases that came with the first letter of June
4 the 13th?

5 MS. MENAKER: Yes. And it is the last tab
6 in that package, Tab 9.

7 PRESIDENT VEEDER: Tab 9, thank you.

8 MS. MENAKER: Sure.

9 And that Court said, and I quote,
10 Although--it's star 1115. Page three.

11 The Court stated, "Although the Court of
12 Appeals correctly points out"--it is on the first
13 column, the column to your left, in the middle of
14 that first full paragraph, about halfway down,
15 right after the double star 1115.

16 And this pertained--they were discussing
17 the ordinance quite similar to the Brea city
18 ordinance that prohibited private persons from
19 removing things from the trash. And they said,
20 Although the Court of Appeals correctly points out

21 the Port Townsend ordinance was intended to protect

1745

1 the health of the general public, rather than
2 individual privacy interests in garbage, we find
3 this irrelevant. One can reasonably infer from
4 these ordinances that only trash collectors and not
5 others will handle one's trash. It would be
6 improper to require that in order to maintain a
7 reasonable expectation of privacy in one's trash,
8 that the owner must forgo use of ordinary methods
9 of trash collection, end quote. So, I think this
10 provides the.

11 So, I think this provides further
12 authority for the proposition that one cannot
13 merely look at what it perceives to be the purpose
14 of the ordinance and then if activity falls within
15 the prohibited actions in that ordinance, disregard
16 that because it doesn't think that the activity was
17 one that was foreseen or thought about by the
18 Legislature adopting the ordinance. And in any
19 event, I think we have shown that according to the
20 legislative policies set forth in the ordinance
21 itself that its purpose was indeed broader than

1746

1 just addressing issues of sanitation.

2 So, those are the reasons why we submit
3 the activity in question did, indeed, violate the

4 Brea city ordinance.

5 I now want to turn to Methanex's argument
6 that even if the activity violated the language of
7 the ordinance, that this ought to be disregarded
8 because the ordinance is somehow invalid under
9 California law.

10 Now, first, Methanex has pointed to no
11 authority to support the proposition that a private
12 person may disregard the law because he or she
13 believes that the law might be invalid or otherwise
14 preempted by either state or federal law. And,
15 indeed, under California law, even an
16 administrative agency would not be able to ignore
17 or refuse to enforce an ordinance if it thought
18 that the ordinance was unconstitutional. And this
19 is set forth in the California Constitution in
20 Article 3, Section 3.5.

21 PRESIDENT VEEDER: Just pausing there, why

1747

1 is that relevant to us? Unless we're being treated
2 as an administrative agency?

3 MS. MENAKER: I think that it is relevant
4 only insofar as it shows that even within the
5 California government that other governmental
6 agencies would have looked at the statute and would
7 have had to have presumed that it was valid and
8 enforceable, unless and, if I read through this,
9 you will see, unless an appellate court in
10 California has deemed the statute to be invalid,

11 they are under an obligation to enforce this--the
12 ordinance.

13 PRESIDENT VEEDER: So, you're saying a
14 trial court would have to convict on the facts,
15 notwithstanding an argument that the ordinance was
16 unconstitutional or otherwise invalid?

17 MS. MENAKER: I don't think that this
18 provision says that. I think that a trial court,
19 if you were in trial court, a trial court could
20 presumably, I'm guessing, look and determine the
21 validity of the ordinance, but an administrative

1748

1 agency would not be able to refuse to enforce the
2 ordinance unless an appellate court held that
3 ordinance to be unconstitutional. It could not
4 because a trial court, for instance, found it to be
5 unconstitutional. That would not be reason enough
6 for the administrative agency to deem the ordinance
7 invalid.

8 PRESIDENT VEEDER: Again, I'm sorry, I'm
9 not following you. My fault. But why is that
10 relevant to us, unless we're being treated as an
11 administrative agency?

12 MS. MENAKER: I think it's relevant
13 insofar as the ordinance is presumptively valid on
14 its face, and Methanex has not pointed to any
15 California either court or statute that invalidates
16 the ordinance. And that was the point that I was
17 trying to make.

18 So, absent such a showing, absent a citing

19 of either a California statute that explicitly
20 overrules this statute, this ordinance, excuse me,
21 or a case that explicitly overrules it, the

1749

1 ordinance is presumptively valid.

2 Now, Methanex has cited a number of cases
3 for the proposition that an ordinance that
4 conflicts with California general law is invalid,
5 and we submitted on Sunday an opinion from the
6 California Attorney General that explained what
7 general law was and explained the stature of an
8 ordinance under California law. And essentially,
9 that opinion holds or sets forth that in the
10 absence of conflicting state statutory law, an
11 ordinance has the same force of law as a state
12 statute.

13 Now, yesterday, Methanex distributed to
14 the Tribunal copies of a decision, it's the Wexner
15 decision. That is a decision of the California
16 court, an intermediate appellate court, and
17 Methanex cited that for the proposition that the
18 Attorney General's opinion was incorrect; that an
19 ordinance could be deemed invalid if it conflicted
20 with any common law in the state of California. I
21 would just like the Tribunal to be aware that that

1750

1 opinion was de-published. If you look at the copy

2 of the Wexner decision that was distributed by
3 Methanex, it notes that it is an unpublished
4 decision.

5 Now, according to the California court
6 rules, Rule 977 of the California Rules of the
7 Court, an opinion of a court of appeal or an
8 appellate division of the Superior Court that isn't
9 certified for publication or ordered published
10 shall not be cited or relied on by a court or a
11 party in any other action or proceeding, except in
12 two very narrow circumstances that aren't
13 applicable here.

14 So, if we were in a California court, a
15 California court would not consider this case, and
16 a party would not be permitted to cite this case to
17 the California court.

18 The two narrow exceptions, if the Tribunal
19 is interested, only apply when the case is relevant
20 to an issue of res judicata, collateral estoppel
21 law of the case, or if it's relevant for a criminal

1751

1 or disciplinary action because it states the reason
2 for a decision involving the same defendant or
3 respondent in another case. And obviously neither
4 of those conditions is met here.

5 So, where we are is Methanex has to show
6 in order to prove that this Brea ordinance was
7 invalid, that it conflicts with the California
8 statute. It has pointed to no such statute.

9 Now, under California law, an ordinance
10 will only be deemed to conflict with a statute if
11 there is an explicit statute with which it
12 conflicts or if the Legislature has indicated an
13 intent to fully occupy the field that the ordinance
14 is addressing. It's a preemption analysis.

15 Now, here Methanex hasn't shown that the
16 City of Brea, when it enacted the ordinance that it
17 legislated in an area that the state indicated that
18 it intended to fully occupy. And to the contrary,
19 preemption can't be found here because the
20 Legislature has expressed its intent to allow local
21 regulations of this nature, and I would again

1752

1 direct the Tribunal to both first the provisions of
2 the California Constitution that we submitted on
3 Sunday evening, and also the provision of the
4 California Integrated Waste Management Act of 1989.

5 And the California constitutional
6 provision provides that counties and cities may
7 make and enforce within their limits all local,
8 police, sanitary, and other ordinances and
9 regulations that are not in conflict with the
10 general laws. The Integrated Waste Management Act
11 recognizes the authority of local jurisdictions to
12 regulate aspects of waste handling that are of
13 local concern. And again, another one of the
14 Attorney General opinions that we provided you also
15 recognizes that one of the traditional functions
16 and services of local government has been the

17 collection and disposal of garbage.

18 So, there is no implied preemption here.

19 There is--in a typical preemption argument you

20 would have to show, one, that there was a

21 conflicting statute. Methanex has not shown that.

1753

1 Or second, that the Legislature, although
2 there wasn't a statute in place, impliedly assumed
3 to take control to legislate over that entire area
4 of the law, and quite the contrary is true here.

5 And in any event, Methanex has not shown
6 any conflict between the Brea city ordinance and
7 any California law whatsoever, be it statutory or
8 common law.

9 The cases that Methanex has cited to
10 purportedly demonstrate such a conflict are all
11 distinguishable. Those cases apply to the criminal
12 context and are interpreting the Fourth Amendment
13 to the United States Constitution or a state law
14 equivalent to the Fourth Amendment. That applies
15 to unreasonable searches and seizures by government
16 agents and not to private intrusions by
17 individuals. And so, it is inapplicable.

18 Now, this was made clear in the Supreme
19 Court opinion Katz versus United States, which we
20 also supplied on Sunday. If you turn to page four
21 of that opinion, and that was contained at tab

1 seven. I just refer the Tribunal on page four, and
2 I see that we are running short of time, so I will
3 just summarize here.

4 This opinion recognizes that the Fourth
5 Amendment does not--isn't translated into a general
6 constitutional right of privacy, but rather, that
7 the protection of an individual's privacy is left
8 largely to the law of the individual states.

9 So, the whole--the jurisprudence
10 pertaining to Fourth Amendment analysis is not
11 applicable here, and as I discussed the other day,
12 city officials, like law enforcement officials, are
13 explicitly exempted from the Brea city ordinance,
14 and in response to President Veeder's question as
15 to whether Federal law enforcement agents were
16 covered, the answer to that question is, no, they
17 would not be covered under well established law in
18 the United States that basically holds that the
19 lawfulness of searches that are conducted by
20 Federal agents is determined by Federal law and may
21 be lawful even if it violates state law.

1 So, the whole issue of whether this
2 pertains to a law enforcement official is beside
3 the point. It does not.

4 Now, what I will do, given the time, is I
5 have a number of other points which I could make on
6 this point, but I sense that you're interested in

7 the area of trespass, so perhaps I should move on
8 to that area, and then I can answer questions to
9 the extent you have any.

10 Now, in our view, what occurred here did
11 constitute a trespass under California law.
12 Mr. McAnish entered an area not during business
13 hours. It was inside the building. It was not
14 open to the public. It was not an area in which
15 the public was invited to enter. And I would
16 direct the Tribunal's attention to the Schlesinger
17 case. That's the Walt Disney case that we
18 previously provided. In that case, the documents
19 at issue were taken out of a dumpster that was
20 located on private property, and that was held to
21 constitute a trespass.

1756

1 The Court there referred to the Burbank
2 Municipal Code, which is similar to the Brea city
3 ordinance in all pertinent respects.

4 Now, in one of the sites from where the
5 documents were taken, the one on which the Tribunal
6 relied, the Court relied, excuse me, there were
7 gates around this property. On another site there
8 was a fence around the property.

9 Now, Methanex has sought to distinguish
10 this case on the grounds that the dumpsters in that
11 case were reserved for a single tenant and weren't
12 in a communal area. The Court, however, noticed
13 that Disney had a leasehold interest in the
14 property. It is not clear from the facts in that

15 case whether or not Disney shared a dumpster with
16 any other tenants or businesses, and that fact
17 would be irrelevant anyway. The Court based its
18 decision on the fact that the person in question
19 had to trespass onto Disney's property and open the
20 closed gates to get to the trash.

21 Now, here the trash may have been in a

1757

1 place where other people's trash was also placed,
2 but it was behind closed doors, and the trash was
3 not commingled with the other tenants' trash.
4 Regent International also had a leasehold interest
5 in the property. It paid fees, separate fees, for
6 that communal space in the trash room.

7 I will also briefly discuss the case of
8 Ananda Church. That is the case that arose from
9 the insurance dispute where one party sought to
10 recover from its insurance agency for a breach of a
11 duty to defend and indemnify against liability that
12 arose out of the insured's removal of documents
13 from its--an attorney's trash.

14 In that case, the Court found that the
15 documents were not covered, were not tangible
16 property within the meaning of the insurance policy
17 and thus, not subject to protection under the
18 policy, but in dicta it recognized that the
19 plaintiffs might have a suit against Ananda Church
20 for the exploitation of the information in the
21 documents which included trespass.

1758

1 And in the footnote--and I will find you
2 the footnote on which place that footnote is. It
3 says here that if the plaintiffs suffered--it's
4 page seven, footnote five. The Court says that to
5 the extent that the plaintiffs suffered any loss,
6 it wasn't caused by their inability to use the
7 paper that they had discarded, but by the
8 exploitation of the information that was contained
9 in the papers following the papers' removal from
10 the garbage, and then the Court notes, for this
11 reason the plaintiff's causes of action for
12 trespass, invasion of privacy, and interference
13 with business relations were those apropos to the
14 injuries they suffered.

15 And I think finally I just want to make a
16 few comments on the cases that Methanex brought to
17 your attention today on trespass. The first is the
18 Navratil case, the Louisiana case. That was the
19 first one that Methanex cited.

20 Here, when discussing trespass, the Court
21 stated that the trespasser has to be shown to have

1759

1 entered the premises, despite evidence that the
2 owner wanted to maintain the privacy of the
3 premises. And they said the owner could give such
4 an indication by, and this is on page three, right

5 before headnote one, it says this can be done by
6 erecting fences or maintaining other restraining
7 devices.

8 Now, in this case, how can placing the
9 trash behind two closed doors be any less
10 indicative of an intent to secure privacy than by
11 erecting a fence? It is not any less indicative,
12 and this is also from this decision, of the owner's
13 intent to limit entry on his property.

14 Now, in the St. Louis County case, which
15 is the abortion clinic case, you know, President
16 Veeder, you brought Methanex--to Methanex's
17 attention the language that is on page four of that
18 decision at the bottom paragraph, where it notes
19 that a person--when a facility, a business is open
20 to the public or a portion of the business is open
21 to the public, a person who enters an area open to

1760

1 the public at a reasonable time and in a reasonable
2 manner has the implied content of the owner to
3 enter the premises upon a limited privilege, and as
4 long as the privilege is based upon an implied
5 consent, is within, and then it's within
6 conditional or restricted consent of the owner so
7 long as the implied consent remains.

8 The Court goes on to say that there are
9 certain instances when that implied consent can be
10 deemed revoked, and this is on the follow-on
11 paragraph. It says: So long as there is no
12 substantial evidence of the stay being prolonged, a

13 breach of the peace, or other conduct which would
14 revoke the implied consent of the owner by acts
15 inconsistent with the purposes of the business or
16 facility. And indeed, the acts undertaken by
17 Mr. McAnish can be clearly be said to be
18 inconsistent with the purposes of Regent
19 International and not in Regent International's
20 interests. And therefore, any implied consent that
21 Mr. McAnish had to enter the public areas of that

1761

1 building certainly did not extend to entering the
2 closed trash door area and certainly did not extend
3 to taking actions that were inconsistent with the
4 purposes of the business.

5 I think, given the time there are a number
6 of other points, and obviously Methanex has
7 introduced a number of cases, all of which we
8 believe are either not on point or can be easily
9 distinguished. And we are happy to answer
10 questions, but given the time, perhaps I ought to
11 stop there and let Mr. Legum make some concluding
12 remarks. And then, of course, we are at your
13 disposal to the extent you have questions.

14 PRESIDENT VEEDER: Mr. Legum

15 MR. LEGUM: I will be very brief.

16 The argument I would like to respond to is
17 the argument that based on equitable
18 considerations, even if the Tribunal finds these
19 documents to have been illegally obtained, it

20 should admit them anyway. That would be contrary,
21 we submit, To the principle of equality of arms in

1762

1 arbitration, recognized in Article 15(1) of the
2 UNCITRAL Rules.

3 The United States has--

4 PRESIDENT VEEDER: You will address, I
5 hope, very soon, Mr. Dugan's argument about
6 equality of arms going the other way, that he
7 couldn't get any of these documents for this
8 hearing in any other way than this particular
9 procedure.

10 MR. LEGUM: I would be happy to do that,
11 and I will.

12 PRESIDENT VEEDER: Okay.

13 MR. LEGUM: The United States has operated
14 in this arbitration on the assumption that neither
15 party would use illegal means to collect evidence.
16 In an investor-state arbitration, when it is a
17 government that is on the other side, respect for
18 this principle is particularly important. We are
19 officers of the government. We have a sworn duty
20 to abide by the law, and it would put respondents
21 in these cases at a disadvantage if claimants could

1763

1 violate the law to obtain evidence while
2 respondents were not permitted to do so.

3 Turning to the specific argument that
4 Mr. Dugan made that they couldn't obtain these
5 documents from--by any other means, that has not
6 been established. There is no evidence that
7 Methanex ever contacted Mr. Vind to ask for his
8 testimony, to ask for the documents in question.
9 And the suggestion that they have been somehow
10 thwarted in their efforts to obtain that evidence
11 by the United States is simply not--not the case.

12 Methanex applied to the California courts,
13 as the Tribunal is aware, under Section 1782. That
14 statute, in our view, does not apply; and in any
15 event, there were strong discretionary grounds for
16 the Court to deny that application. Methanex, on
17 its own volition, withdrew that application. The
18 United States did not compel Methanex to withdraw
19 that application in any way.

20 What's more, the document collection
21 effort here was undertaken long before Methanex

1764

1 ever suggested that it would resort to the courts
2 to seek a subpoena to collect the documents.

3 PRESIDENT VEEDER: Well, you can make a
4 strong point, again, long before these proceedings
5 were possibly contemplated by Methanex.

6 MR. LEGUM: That's certainly true for the
7 first collection effort, probably not for the
8 second collection effort.

9 And finally, and this is somewhat ironic,
10 but many of the documents that are the subject of

11 the Tribunal's deliberations right now, Methanex
12 couldn't get through a subpoena anyway because it
13 had the copies.

14 Now, when it comes to the telephone
15 message book, we have seen that Methanex has the
16 original. If they'd succeeded in getting a
17 subpoena from the courts under Section 1782, they
18 couldn't get from that Mr. Vind. Mr. Vind does not
19 have it. Methanex does. So, it's rather ironic
20 that that's what Methanex is relying upon.

21 Finally, in terms of policy concerns, if

1765

1 the Tribunal, if a NAFTA Tribunal condones
2 collection of documents through illegal means, that
3 would create an incentive for parties to use ever
4 more offensive means for collecting evidence.
5 That's not the direction that we submit the
6 Tribunal should go in.

7 For those reasons as well as for the
8 others we've outlined, we submit that the evidence
9 should be deemed inadmissible.

10 PRESIDENT VEEDER: Mr. Legum, you used the
11 word illegal. Do you draw a difference between
12 collecting evidence through what is a criminal act,
13 i.e., a breach of the ordinance, and trespass,
14 which would ordinarily not be a criminal offense,
15 but give rise to a liability in civil law?

16 MR. LEGUM: We do not.

17 ARBITRATOR ROWLEY: Mr. Legum, is there an

18 exclusionary rule used in or available in the
19 United States for civil cases?

20 MR. LEGUM: With your permission, I will
21 defer that question to my more knowledgeable

1766

1 colleague.

2 MS. MENAKER: Generally speaking, it is
3 our understanding that the exclusionary rule that
4 was developed with the Fourth Amendment
5 jurisprudence does not apply in civil cases, and
6 Professor Reisman did point out one case, one
7 United States Supreme Court case, where the Court
8 did apply, I guess, the exclusionary principle in a
9 civil law case.

10 However, although there is no, as far as
11 we are aware, per se exclusionary rule that mirrors
12 the Fourth Amendment exclusionary rule in civil
13 cases, courts have, indeed, exercised their
14 discretion to exclude evidence that was illegally
15 obtained, and again, I would direct the Tribunal's
16 attention to the Disney case, the Schlesinger case.
17 And there the retrieval of the documents in that
18 case was found to be a trespass. It was found to
19 be a violation of the municipal ordinance, the
20 Burbank municipal ordinance. And the Court there
21 not only did not admit the evidence, but they

1767

1 actually dismissed the case.

2 Also, I would just point out that the
3 Pullin case that Methanex cited, that case actually
4 applied to evidence that was seized by a law
5 enforcement official in a criminal proceeding that
6 was illegal. It was a warrantless search under the
7 Fourth Amendment, and later that same evidence was
8 sought to be admitted in a later civil action, so
9 that is not directly analogous to the case here.
10 In that civil case, they permitted that evidence to
11 be introduced, but that was already evidence that
12 was retrieved by law enforcement officials, not by
13 private individuals.

14 PRESIDENT VEEDER: Time is running on.
15 It's 2:02, but we are going to break for a few
16 minutes and we will come back, if you will just
17 remain in the room. Thank you.

18 (Brief recess.)

19 PRESIDENT VEEDER: Let's resume.

20 We have now come to the end of the
21 parties' oral submissions in regard to the USA's

1768

1 motion of the 18th of May 2004, on which we have
2 heard much argument and testimony over the last
3 several days. We shall give reasons for this order
4 later.

5 We have already intimated, and we confirm,
6 that in regard to the USA's challenge to the
7 admissibility of the Dunne documents--and I listed
8 those exhibits earlier--we uphold the United

9 States' s challenge and direct that those documents
10 shall not form part of the evidential record in
11 these arbitration proceedings.

12 In regard to the USA' s challenge to the
13 admissibility of Exhibits 217 to 219, 222, 223,
14 226, 258 and 259, which correspond to Tabs 24 to 31
15 of the McAnish documents, we also uphold the USA' s
16 challenge to the admissibility of those materials.
17 And we also direct that those documents shall not
18 form part of the evidential record in these
19 arbitration proceedings. We shall give reasons for
20 this order later.

21 Now, that concludes our ruling on the

1769

1 USA' s motion. There is another part of the motion
2 to which we have to return in a completely
3 different connection, but in regard to this ruling
4 we now anticipate that Mr. Vind will not be
5 required to give evidence by telephone at 2:00,
6 there being no other relevant application to
7 cross-examine him further by Methanex.

8 Mr. Dugan; is that right?

9 MR. DUGAN: That' s correct.

10 PRESIDENT VEEDER: In that event, we have
11 come to the end of the testimony of this oral
12 hearing, and we move now to the parties' closing
13 oral arguments. As we understood you, Mr. Dugan,
14 shortly before this morning' s hearing started, you
15 do not wish to proceed today with your application

16 for the Tribunal to reconsider its First Partial
17 Award; is that right?

18 MR. DUGAN: That's correct. We will
19 address that tomorrow. And as I said, the aspects
20 that we will be addressing tomorrow have to do with
21 the existence of the regulation that specifically

1770

1 identifies methanol and some other aspects, as
2 well.

3 PRESIDENT VEEDER: Again, shortly before
4 this hearing started, just to play it safe as
5 regards time, it was considered that it would be
6 better to start at 1:30 tomorrow rather than 2:00.
7 Is that agreed with both parties?

8 MR. DUGAN: That's fine with us.

9 MR. LEGUM: It's agreeable to us as well.

10 PRESIDENT VEEDER: So, we will start at
11 1:30 tomorrow morning where you, Mr. Dugan, will
12 have the floor.

13 And do you anticipate any particular
14 period of time you need for your closing oral
15 argument?

16 MR. DUGAN: Well, I think including
17 everything, it would be about four hours. It will
18 be my guess.

19 PRESIDENT VEEDER: Then we would move to
20 you, United States, on Thursday at 1:30. And
21 again, is there any estimate that you have in mind?

1 MR. LEGUM: Certainly no longer than what
2 Methanex will take.

3 PRESIDENT VEEDER: Okay. At this stage,
4 is there anything else that we need to do?
5 Mr. Dugan first.

6 MR. DUGAN: No, not that I'm aware of.

7 PRESIDENT VEEDER: Mr. Legum?

8 MR. LEGUM: No, thank you.

9 PRESIDENT VEEDER: Thank you.

10 We'll close the hearing now. We will
11 start again tomorrow afternoon at 1:30. Thank you
12 very much.

13 (Whereupon, at 1:57 p.m., the hearing was
14 adjourned until 1:20 p.m., the following day.)

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1 **CERTIFICATE OF REPORTER**

2

3 I, David A. Kasdan, RMR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by

7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.

11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

16

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DAVID A. KASDAN

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